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I hereby certify that copies of the following documents, excluding the exhibits to the document at Item 1 below:

1. Request of Defendants Hecla Mining Company and Asarco Incorporated for Final Relief on Motion to Modify Consent Decree, dated April 1, 2003;
2. Request of Defendants Hecla Mining Company and Asarco Incorporated for a Briefing Schedule and Hearing, dated April 1, 2003;
3. Declaration of Elizabeth H. Temkin, dated March 25, 2003;
4. Declaration of J. Christopher Pfahl, dated March 28, 2003;
5. Declaration of Arthur Brown, dated March 21, 2003; and
6. Declaration of Daniel Meyer, dated March 24, 2003.

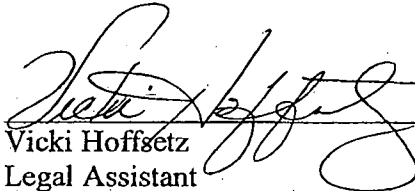
were sent by facsimile on the 2 day of April, 2003, to the parties and fax numbers listed below; and

I hereby further certify that the above documents including all exhibits were deposited in the United States mail, postage prepaid, this 2 day of April, 2003, addressed to the following parties:

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ATTORNEYS FOR
DEFENDANT ASARCO, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA and
STATE OF IDAHO,

Plaintiffs,

V.

ASARCO INCORPORATED, COEUR D'ALENE
MINES CORPORATION, CALLAHAN MINING
CORPORATION, HECLA MINING COMPANY,
SUNSHINE PRECIOUS METALS, SUNSHINE
MINING COMPANY.

Defendants.

NO: CV 94-0206-N-EJL

) REQUEST OF
) DEFENDANTS HECLA
) MINING COMPANY
) AND ASARCO
) INCORPORATED FOR A
) BRIEFING SCHEDULE
) AND HEARING

On even date herewith, Hecla Mining Company and Asarco Incorporated filed their Request for Final Relief on their Motion to Modify Consent Decree ("Request for Final Relief"). The Companies request that the Court set a briefing schedule on the Request for Final Relief, as follows:

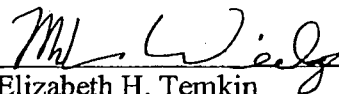
Due Date for Plaintiffs' Response(s): 10 days after fax service of Request

Due Date for Defendants' Reply or Replies: 5 days after fax service of Response

The Companies also request that the Court forthwith schedule a hearing to occur within a few days after the filing and service of Defendants' Reply or Replies in this matter, given the impending 2003 construction season and the 1994 Consent Decree's April 15 deadline for work plan submittal.

Respectfully submitted this 1st day of April, 2003.

TEMKIN WIELGA & HARDT LLP

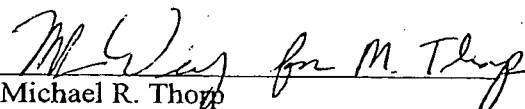
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**ATTORNEYS FOR DEFENDANT
ASARCO INCORPORATED**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA and
STATE OF IDAHO,

Plaintiffs,

v.

ASARCO INCORPORATED, COEUR
D'ALENE MINES CORPORATION,
CALLAHAN MINING CORPORATION,
HECLA MINING COMPANY,
SUNSHINE PRECIOUS METALS,
SUNSHINE MINING COMPANY,

Defendants.

Case No. CV 94-206-N-EJL

DECLARATION OF J.
CHRISTOPHER PFAHL

I, J. Christopher Pfahl, hereby declare and state as follows:

1. I am currently closed plant site manager for ASARCO Incorporated ("Asarco"). My office is located in Osburn, Idaho. I have been working for Asarco in the Coeur d'Alene River Basin since 1977. My responsibilities include accounting for the expenditures of the Upstream Mining Group pursuant to the Bunker Hill Consent Decree. I make this declaration based upon my own personal knowledge.

2. On September 18, 2001, I testified at the evidentiary hearing in this matter. Exhibit 4 to the Request of Defendants Hecla Mining Company and ASARCO Incorporated for Final Relief on Motion to Modify Consent Decree ("Request For Final Relief") is a true and correct copy of the transcript of my testimony.

3. In August 1991, EPA issued its Record of Decision ("ROD") for the Residential Soils Operable Unit of the Bunker Hill Mining and Metallurgical Complex. At the time the ROD was issued, EPA estimated that the present worth cost for the selected remedy was \$40.6 million. Exhibit 5 to the Request For Final Relief is Chapter 9 of the ROD which includes Table 9-2 of the ROD "Summary of Estimated Costs for Selected Remedy."

4. For the period beginning with entry of the Bunker Hill Consent Decree in November 1994 and ending December 31, 2002, Hecla and Asarco have spent \$44.7 million implementing the Consent Decree and the Residential Soils Operable Unit ROD. It is currently estimated that it will cost an additional \$18.1 million to complete implementation of the Residential Soils Operable Unit ROD pursuant to the terms of the Consent Decree. Exhibit 6 to the Request For Final Relief are spreadsheets which depict both cost to date and estimated costs.

5. Of the \$44.7 million spent to date by Asarco and Hecla to implement the Residential Soils Operable Unit ROD, \$11.9 million was spent on remediation activities in Pinehurst.

6. Asarco is not liable for the costs of remediation of the Pinehurst area, either under CERCLA or any other federal statute. This was confirmed by the Order entered by the Court in United States, et al. v. ASARCO Incorporated, et al., No. 96-0122-N-EJL on June 1, 2000. Exhibit 7 to the Request For Final Relief is a copy of that Order. On page 5 of that Order, the Court granted Asarco's motion for summary judgment as to certain

non-Asarco drainages including Pine Creek and all of its tributaries except Little Pine Creek. See also, Declaration of J. Christopher Pfahl in Support of Defendant Asarco Incorporated's Motion for Partial Summary Judgment Re Claim for Natural Resource Damages and Response Costs in Non-Asarco Drainages, which is attached to the Request For Final Relief as Exhibit 8. Indeed, the United States did not oppose Asarco's motion for summary judgment with respect to Pine Creek except for that portion of Pine Creek downstream of the confluence with Little Pine Creek. See Memorandum Of Plaintiff United States Of America In Response To Defendant Asarco's Motion For Partial Summary Judgment On Claims For Natural Resource Damages and Response Costs In Non-Asarco Drainages at Page 6. That memorandum is attached to the Request For Final Relief as Exhibit 9.

7. As I have previously testified in this matter, Asarco's expectation was that in lieu of placing the entire Coeur d'Alene Basin on the CERCLA National Priorities List, EPA, the State of Idaho and other agencies would use a range of authorities including CERCLA removal actions to address contamination upstream and downstream of the Bunker Hill Mining and Metallurgical Complex Superfund Site. Asarco's expectation as to the level of effort which would be required by the agencies under this arrangement is along the lines actually carried out by the Silver Valley Natural Resource Trustees, EPA and Hecla during the period 1994 through 1999. During this five-year period, those entities spent approximately \$6,455,000 on a series of annual projects. A listing of the projects and costs is attached to the Request For Final Relief as Exhibit 10.

The undertaking of these projects resulted in the combined expenditure of something in the neighborhood of \$1 million to \$1.5 million per year. This was the range of yearly expenditure and activity contemplated by Asarco that would occur throughout the Basin in lieu of the Superfund listing. In addition, it was Asarco's understanding that EPA's agreement not to "Superfund" the Basin meant that the company would not be required to undertake widespread residential yard remediation outside of the Box.

8. The cooperative remediation effort that previously had been undertaken by Asarco, Hecla, the Silver Valley Natural Resource Trustees, EPA, the State of Idaho and others effectively ended when the United States sued the mining companies for Basin-wide CERCLA response costs and natural resource damages and EPA began expanding the boundaries of the Superfund site from the Box to the Basin.

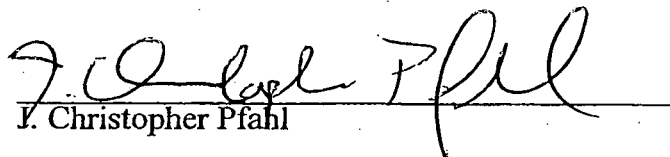
9. In September 2002, EPA released its ROD for Operable Unit 3 of the Bunker Hill Mining and Metallurgical Complex Superfund facility. Operable Unit 3 covers the Coeur d'Alene Basin outside the original Superfund "Box." According to the ROD, the estimated cost of implementation of the ROD is \$360 million.

10. Attachment B to the 1994 Consent Decree is the Bunker Hill Remedial Design and Remedial Action Area I Statement of Work ("SOW"). Section 5.1 of the SOW requires that Asarco and Hecla produce for EPA and the State of Idaho an annual remedial action work plan on or before April 15 of each year. Each year's work is to be initiated by June 15. Exhibit 11 to the Request For Final Relief are copies of the relevant pages of the SOW.

11. On February 3, 2003, Asarco entered into a consent decree with the United States of America entitled, United States of America v. Asarco, Inc. and Southern Peru Holdings Corporation, No. CV02-2079-PHX-RCB (District of Arizona). Exhibit 12 to the Request For Final Relief is a copy of that Consent Decree. Pursuant to the terms of that Consent Decree, the United States has conditionally approved the sale of Asarco's interest in Southern Peru Copper Company. The terms and conditions of the Consent Decree are conditioned upon the finalization of the sale of Asarco's interest in Southern Peru Copper Company. As of this date, closing of that transaction has not occurred. Once it does occur, an Environmental Trust will be created pursuant to the terms of which the sum of \$12.5 million will be available each year for the next five years to be used in connection with certain environmental liabilities of Asarco including liabilities under the Consent Decree in this case. In addition, the United States has agreed in the Consent Decree that Asarco's liability over and above payments into the Environmental Trust shall not exceed the following limits for the following years: calendar year 2003 — \$2 million; calendar year 2004 — \$2.5 million; and calendar year 2005 — \$3 million. As I have indicated, these commitments by Asarco and the United States are not effective until sale of Southern Peru Copper Company has occurred which has not yet happened. In addition, following calendar year 2005, there is no further limitation on the amount of money that the United States can require of Asarco in connection with environmental liabilities.

I, J. Christopher Pfahl, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated this 28 day of March, 2003


J. Christopher Pfahl

ATTORNEYS FOR
DEFENDANT HECLA MINING CO.

ATTORNEYS FOR
DEFENDANT ASARCO, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA and
STATE OF IDAHO,

Plaintiffs,

v.

ASARCO INCORPORATED, COEUR D'ALENE MINES CORPORATION, CALLAHAN MINING CORPORATION, HECLA MINING COMPANY, SUNSHINE PRECIOUS METALS, SUNSHINE MINING COMPANY,

Defendants.

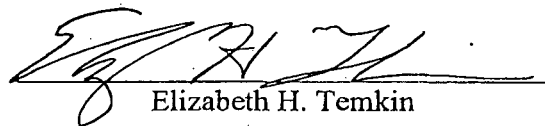
) NO: CV 94-0206-N-EJL

) DECLARATION OF
) ELIZABETH H. TEMKIN

I, Elizabeth H. Temkin, being duly sworn, declare under penalty of perjury under the laws of the United States of America that the following is true and correct to the best of my knowledge and belief.

1. I am outside counsel in this matter for Hecla Mining Company.
2. Attached hereto as Exhibit 1 to this Request of Defendants Hecla Mining Company and Asarco Incorporated for Final Relief on Motion to Modify Consent Decree is a true and correct copy of the 2002 Record of Decision for Operable Unit 3 of the so-called Bunker Hill Mining and Metallurgical Complex Superfund Site with EPA's accompanying summary fact sheet. Operable Unit 3 covers the Coeur d'Alene Basin outside the original Superfund "box."
3. Attached hereto as Exhibit 2 to this Request for Relief is a true and correct copy of an April 18, 2000 Declaration of Michael B. White in support of Hecla's response to the Plaintiffs Motion for Partial Summary Judgment as to Hecla's Liability in the so-called "Basin litigation." In Paragraph 8(d) of that Affidavit, Mr. White lists "Pine Creek and all its tributaries" as one of the areas in the Coeur d'Alene Basin "where Hecla, its subsidiaries and predecessors conducted no mining activity which generated waste disposal." (emphasis added).

Executed this 25th day of March, 2003 in Denver, Colorado.


Elizabeth H. Temkin

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DEFENDANT HECLA MINING CO.

ATTORNEYS FOR
DEFENDANT ASARCO, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA and
STATE OF IDAHO,

Plaintiffs,

v:

ASARCO INCORPORATED, COEUR D'ALENE
MINES CORPORATION, CALLAHAN MINING
CORPORATION, HECLA MINING COMPANY,
SUNSHINE PRECIOUS METALS, SUNSHINE
MINING COMPANY,

Defendants.

) NO: CV 94-0206-N-EJL

DECLARATION OF DANIEL MEYER

I, Daniel Meyer, being duly sworn, declare under penalty of perjury under the laws of the United States of America that the following is true and correct to the best of my knowledge and belief.

1. I am project manager for the Upstream Mining Group ("UMG") with respect to implementation of the work requirements of the 1994 Bunker Hill Consent Decree. I have held this position since 1994.
2. The United States and the State of Idaho have been pressing Hecla and the UMG as to the 2003 Bunker Hill "Box" work commitment and for a full, 200 yard work plan for 2003, even though Asarco's commitment to any 2003 Box work commitment is admittedly uncertain. These demands were most recently made at a March 12, 2003 meeting between Hecla and the governments in Seattle. The deadline for work plan submittal is April 15, 2003.
3. I was in attendance at an October 3, 2002 presentation by Panhandle Health District on the 2002 blood lead sampling results for children residing in the Box and the Basin, respectively. Attached as Exhibit 3 to the Request of Defendants Hecla Mining Company and Asarco Incorporated for Final Relief on Motion to Modify Consent Decree is a true and correct copy of the materials distributed at this meeting. These materials show that 98% of children in the Box tested in 2002 have blood lead levels of less than 10 $\mu\text{g}/\text{dl}$. Less than 1% of the tested children had blood levels of 15 $\mu\text{g}/\text{dl}$ or higher.

Executed this 24th day of March, 2003 in Kellogg, Idaho.


Daniel Meyer

ATTORNEYS FOR
DEFENDANT HECLA MINING CO.

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ATTORNEYS FOR
DEFENDANT ASARCO, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA and
STATE OF IDAHO,

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V.

ASARCO INCORPORATED, COEUR D'ALENE MINES CORPORATION, CALLAHAN MINING CORPORATION, HECLA MINING COMPANY, SUNSHINE PRECIOUS METALS, SUNSHINE MINING COMPANY.

Defendants.

) NO: CV 94-0206-N-EJL

) **DECLARATION OF**
) **ARTHUR BROWN**

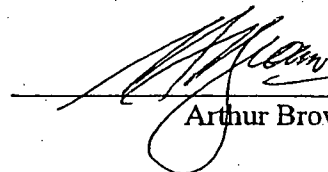
I, Arthur Brown, being duly sworn, declare under penalty of perjury under the laws of the United States of America that the following is true and correct to the best of my knowledge and belief.

1. I am Chairman of the Board and Chief Executive Officer of Hecla Mining Company ("Hecla") and have served in that capacity since 1987.
2. In my leadership and management capacities at Hecla, the negotiations associated with and the key terms of the 1994 Bunker Hill Consent Decree were of critical importance to me. My involvement in those negotiations and relative to subsequent developments is detailed in the testimony I presented to the Court on September 18, 2001.
3. Hecla only agreed to participate in the cleanup of contaminated yards in Pinehurst with great reluctance, in the face of the governments' insistence that, regardless of who might be responsible for the elevated metals in Pinehurst soils, Hecla and the other defendants would have to assume the Pinehurst yard cleanup responsibility as a pre-condition to finalization of the 1994 Decree.
4. Hecla agreed to include Pinehurst in the 1994 Consent Decree in light of the United States' representations not to Superfund the Coeur d'Alene Basin outside the Superfund "Box." Based on those representations, Hecla believed that cleanup of the Pinehurst yards, where the Company had no liability, was a fair and reasonable concession in exchange for the governments' agreement not to seek a massive Superfund cleanup, including yard cleanups, Basinwide outside the Box. Hecla believed that the United

States' commitment not to Superfund the Basin protected Hecla from any prospect of being required to undertake widespread soil cleanups outside the Box.

5. At the time Hecla signed the 1994 Consent Decree, the Company expected that environmental cleanup needs outside the Box would continue to be addressed at a level of funding consistent with the efforts of Hecla and the so-called Silver Valley Natural Resource Trustees ("SVNRT") focused on cleanup activities in Nine Mile and Canyon Creek.
6. Between 1994 and 1999, Hecla contributed approximately \$1 million, plus various services and much needed repository sites, to the SVNRT cleanup efforts.

Executed this 21st day of March, 2003 in Coeur d'Alene, Idaho.



Arthur Brown

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ATTORNEYS FOR
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MINES CORPORATION, CALLAHAN MINING
CORPORATION, HECLA MINING COMPANY,
SUNSHINE PRECIOUS METALS, SUNSHINE
MINING COMPANY,

Defendants.

) NO: CV 94-0206-N-EJL
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)
) REQUEST OF
) DEFENDANTS HECLA
) MINING COMPANY AND
) ASARCO
) INCORPORATED FOR
) FINAL RELIEF ON
) MOTION TO MODIFY
) CONSENT DECREE

Hecla Mining Company ("Hecla"), through its attorneys, Temkin Wielga & Hardt and Barker Rosholt & Simpson, and ASARCO Incorporated ("Asarco"), through its attorneys, Heller Ehrman White & McAuliffe and Sasser & Inglis, hereby request that the Court grant final relief on the Motion to Modify the Consent Decree in this matter.

I. INTRODUCTION AND BACKGROUND

Hecla originally moved to modify the 1994 Consent Decree in January 2001. Asarco joined in that motion. Following briefing and an evidentiary hearing in September 2001, the Court found that changed circumstances warranted modification of the Consent Decree. Order dated September 30, 2001 ("Sept. 30 Order"), pp. 9-11. In particular, the Court found that the U.S. Environmental Protection Agency's ("EPA") decision to "Superfund" the entire Coeur d'Alene Basin made compliance with the 1994 Consent Decree substantially more onerous in exposing Hecla and Asarco to liability far beyond what either contemplated. The Court also found that "enforcement of the 1994 Consent Decree without modification could be detrimental to the public interest because enforcement as contemplated is putting the mining industry out of business." Sept. 30 Order, p. 10. However, the Court reserved ruling on an appropriate modification until after issuance of the Record of Decision ("ROD") for the Basinwide Remedial Investigation/Feasibility Study, because until that time the Court would be unable to determine "[e]xactly how onerous ... compliance with the 1994 Consent Decree" would be after the Basin ROD was issued. Sept. 30 Order, p. 10.

Issuance of the ROD was delayed further than even was anticipated at the time of that decision, and in April 2002 Hecla moved the Court for Interim Relief from the requirements of the Consent Decree with respect to the 2002 Work Plan. Ultimately, the Upstream Mining Group ("UMG," consisting of Hecla and Asarco at this point) and the Plaintiffs reached agreement on a 2002 Work Plan without further decision from the Court.

The ROD for the Basin has now been issued. Exhibit 1. That ROD, as anticipated, outlines a cleanup plan for the Basin that is estimated to cost more than \$360 million. See generally, Fact Sheet, Exhibit 1. EPA's estimated price tag for yard cleanup and related work alone is over \$90 million. Exhibit 1, Tables 12.1-11 through 12.1-14.

Awaiting final resolution of Phase I liability issues in the pending Basin response cost and NRD litigation, or of any of the uncertainties associated with the ROD, before deciding on a final modification of the Consent Decree is impractical and unfair, given that the Court over a year ago found the defendants entitled to relief from the 1994 Consent Decree obligations. The right to and need for final relief on the Motion to Modify is both compelling and current. EPA is pressing the Companies on their commitments for the 2003 construction season, and the deadline for a 2003 Work Plan is fast approaching. Declaration of Daniel Meyer, ¶ 2. The spectre of this year's Work disputes looms large, at a minimum, for all the reasons this Court found to justify modifying the Consent Decree.¹ The costs and uncertainties of these ongoing disputes benefits no one.

¹ The issue of the 2003 Bunker Hill work commitment and, more generally, of Asarco's ongoing obligations under the 1994 Consent Decree, at least for the next three years, may be affected by a recent consent decree entered into between Asarco and the United States in the District of Arizona. Under the terms of that decree, the United States has conditionally withdrawn its objections to the sale of one of Asarco's assets, and, in exchange, Asarco has

This Court held some eighteen months ago that these remaining defendants are entitled to relief from the requirements of that Consent Decree, but that entry of such relief would have to await issuance of the ROD for the Basin. That ROD is now out, and Hecla and Asarco therefore now seek entry of final relief on the Motion to Modify as set forth in detail in this Request and the accompanying Affidavits.

II. RELIEF REQUESTED AND BASIS

For the reasons stated herein, the Court at this juncture should release Hecla and Asarco from any further Box Consent Decree obligations. This would include releasing the Companies from:

- (1) any obligations to fund or perform remedial work in the Box;
- (2) any obligations to fund the Institutional Control Program;
- (3) liability for government Box oversight costs incurred from January 1, 2002 forward.
- (4) cost recovery for Box work done by the governments from January 1, 2002 forward.

To date, Hecla and Asarco have spent approximately \$44.7 million on the implementation of the Box Consent Decree. This includes \$11.9 million spent for soil cleanups in Pinehurst which the Companies agreed to undertake only to obtain the benefits of the Consent

agreed that for each of the next five years \$12.5M of the proceeds from the sale will go into an Environmental Trust which can be used to address Asarco's CERCLA liabilities nationwide, including at the Bunker Hill site. As part of that agreement, the United States has further agreed that Asarco's CERCLA liabilities nationwide will be capped at the payment into the Environmental Trust plus \$2M for 2003, \$2.5M for 2004 and \$3.0M for 2005. After 2005, there is no limit placed on the amount the United States can seek from Asarco for its CERCLA liabilities. The entire decree is conditioned on the sale of Asarco's asset being finalized which has not yet occurred. See, Declaration of J. Chris Pfahl, ¶ 11.

Decree. Declaration of J. Christopher Pfahl, ¶ 5; Declaration of Arthur Brown, ¶¶ 3 and 4.

Neither Company otherwise had any CERCLA responsibility for Pinehurst yard cleanups.

Pfahl Declaration, ¶ 6; Exhibit 2, ¶ 8(d).

EPA's original cost estimate for all of the Box soil cleanup work was approximately \$40 million, in 1991 dollars. See Exhibit 5. This figure grossly underestimated the true cost. Ten years later, in addition to the \$44.7 million already spent, the Companies estimate future costs of \$18.1 million, if EPA insists on project completion under current dictates. Pfahl Declaration, ¶ 4. There are a number of reasons why it is fair to relieve Hecla and Asarco from the remaining 1994 Consent Decree obligations.

First, the Court has ruled that Hecla and Asarco are entitled to a Consent Decree modification that accounts for the \$44.7 million the Companies have spent on Box soil cleanup work to date; plus the Basin ROD and the spectre of liability associated with the ROD's \$360 million price tag.

Second, there is a compelling argument that little, if any, of the work remaining under the Consent Decree may actually be necessary, because the ROD's remedial objective has already been achieved.

The ROD for the Box, which is incorporated by reference in the Consent Decree as Attachment A to the Consent Decree (see 1994 Consent Decree, Section XXX), describes the Remedial Action Objective ("RAO") for the Box remedy as follows:

9.5 PERFORMANCE REQUIREMENTS

A remedial action objective for this operable unit is to decrease the exposure to lead-contaminated residential soils such that 95 percent or more of the children in

the area have blood lead levels below 10 µg/dl [micrograms per deciliter] and that less than 1 percent have blood leads greater than 15 µg/dl.

See Exhibit 5. Thus, by the terms of the ROD, the goal (or, in ROD jargon, the "Remedial Action Objective" or "RAO") of the Box cleanup was to reduce blood lead levels in children living within the Box to the point where at least 95% of children had blood lead levels of less than 10 µg/dl, and fewer than 1% had blood lead levels equal to or greater than 15 µg/dl. This RAO has now been achieved. Results of blood testing of children living in the Box, performed in 2002, show that 98% have blood lead levels of less than 10 µg/dl, and less than 1% have blood lead levels of 15 µg/dl or higher. Meyer Declaration, ¶ 3.

With the RAO achieved, further soil cleanup work in the Box is not necessary under CERCLA and can not be justified. Further, with the remedial objective now satisfied, the government has no rational basis for requiring further yard cleanup as a 1994 Consent Decree "requirement."

Third, when the Companies signed the 1994 Consent Decree, it was with the expectation that environmental cleanup needs outside the Box would continue to be addressed, perhaps under the auspices of the Coeur d'Alene Basin Project, at a level of funding consistent with then ongoing efforts of the individual companies and the Silver Valley Natural Resources Trustees ("SVNRT") to address high priority metals loading sources, particularly along Nine Mile and Canyon Creeks. Pfahl Declaration, ¶ 7; Brown Declaration, ¶ 5. Over the six years between 1994 and 1999, Hecla contributed approximately \$1 million, plus various services and a much needed repository site, to the SVNRT cleanup efforts.

Between 1994 and 1999, the SVNRT spent \$6.4 million in state NRD settlement funds on more than one dozen cleanup projects in the Basin watershed. Federal and state funding of other Basin projects complemented these efforts. Pfahl Declaration, ¶ 7. Any hopes for future funding and the cooperative efforts to move forward in this incremental fashion evaporated with the initiation of the Basin lawsuit, and then, in support of that undertaking, the expansion of the Superfund site Basin-wide. Pfahl Declaration, ¶ 8.

What most certainly was not envisioned at the time the 1994 Consent Decree was entered was widespread soil removals outside-the-Box or Company financing of the same. The Companies believed that the United States' commitment not to Superfund the Basin protected the Companies against this possible outcome. Brown Declaration, ¶ 4; Pfahl Declaration, ¶ 7. Yet widespread, soil cleanups is precisely what the Basin ROD now mandates. See generally, Fact Sheet.

Hecla and Asarco therefore submit that, at this juncture and in light of all the circumstances described to the Court and further addressed in the Affidavits accompanying this Request, the Court should release Hecla and Asarco from further obligation under the Consent Decree as outlined herein.

WHEREFORE, Hecla Mining Company and ASARCO Incorporated respectfully request that the Court enter Final Relief on the Motion to Modify the Consent Decree as set forth herein, and order such other and further relief as the Court finds just and warranted.

Respectfully submitted this 31 day of March, 2003.

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By 

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had no facility or waste disposal." Memorandum of Plaintiff United States of America in Support of Its Motion for Partial Summary Judgment As To Liability of Defendant Hecla Mining Company, p. 3.

8. The tributaries or stream segments where Hecla, its subsidiaries and predecessors, conducted no mining activity which generated waste disposal include, but are not limited to the following areas of the Coeur d'Alene Basin:

(a) The mainstem of the South Fork of the Coeur d'Alene River above Daisy Gulch and the following tributaries to the South Fork of the Coeur d'Alene River between Mullan and Wallace, including but not limited to:

Willow Creek
Boulder Creek
Gold Creek
St. Joe Creek
Rock Creek
Ruddy Gulch
Watson Gulch
Weyer Gulch
Trowbridge Gulch
Dexter Gulch
Daly Gulch

(b) Revenue Gulch above what is known as the "Western Union - upper adit".

(c) All tributaries to the South Fork of the Coeur d'Alene River lying north of the South Fork of the Coeur d'Alene River and west of and including Nuckols Gulch, including but not limited to:

Nuckols Gulch
Shirttail Gulch
Twomile Creek
Jewell Gulch
Terror Gulch
Little Terror Gulch
Prospect Gulch
Moon Creek
Montgomery Gulch
Ross Gulch
Italian Gulch
Jackass Creek
Cook Creek

Sweeney Gulch
Caldwell Gulch
Bear Creek

(d) All tributaries to the South Fork of the Coeur d'Alene River lying south of the South Fork of the Coeur d'Alene River and west of Big Creek (excluding Elk Creek), including but not limited to:

Gold Run Gulch
West Fork of Elk Creek
Slaughterhouse Gulch
Magnet Gulch
Milo Creek
Deadwood Gulch
Government Gulch
Grouse Creek
Humboldt Gulch
Pine Creek and all of its tributaries

(e) All tributaries to Canyon Creek upstream of and including Sawmill Gulch.

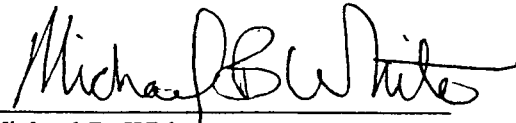
(f) The mainstem of the North Fork of the Coeur d'Alene River and the tributaries to the North Fork of the Coeur d'Alene River, except:

Beaver Creek
Carbon Creek
Missoula Gulch
Dobson Gulch

(g) All tributaries (outside of the floodplain) to the mainstem of the Coeur d'Alene River, downstream (west) of the confluence of the North Fork and the South Fork of the Coeur d'Alene River.

In this regard, I should particularly note that the Declaration of Mary Jane Nearman, dated March 15, 2000, submitted in connection with the United States Statement of Undisputed Facts in Support of Its Motion for Partial Summary Judgment as to Liability of Defendant Asarco, erroneously states at Paragraph 7 that Hecla "currently or formerly owned and/or operated . . . the Success Mine and Mill site on the East Fork of Nine Mile Creek." This statement is incorrect. The Success Mine and Mill site has never been owned or operated by Hecla or any of its subsidiaries or predecessors.

Executed on this 18th day of April, 2000, in Coeur d'Alene, Idaho.

A handwritten signature in black ink, appearing to read "Michael B. White". The signature is written in a cursive style with a horizontal line underneath the name.

Michael B. White

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **AFFIDAVIT OF MICHAEL B. WHITE** were deposited in the United States mail, postage prepaid, this 20th day of April, 2000, addressed to:

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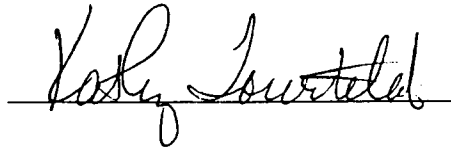
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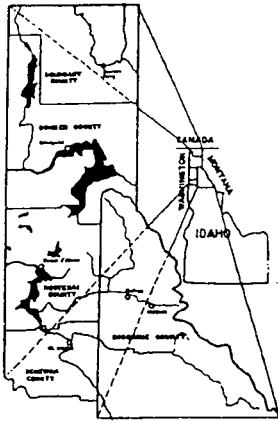
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A handwritten signature in cursive script, reading "Kary L. Surtell", is written over a horizontal line.



PANHANDLE HEALTH DISTRICT I

114 West Riverside Avenue
Kellogg, Idaho 83837-2351

Environmental Health
Vital Statistics
Home Health
WIC Clinics
Health Education
Family Planning
Well Child Conference
VD Clinics
Early and Periodic Screening
Immunizations

Institutional Controls Program
Lead Health Program
Phone: (208) 783-0707
Fax: (208) 783-4242

Bunker Hill Superfund Task Force Meeting
Kellogg Middle School Library
800 Bunker Ave.
Kellogg, Idaho

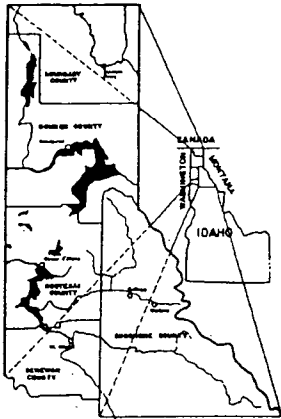
Thursday, October 3, 2002
7:00 P.M.

Moderator: Rob Hanson

<u>Item</u>	<u>Time</u>	<u>Speaker</u>
2002 Blood Lead Screening Results - Basin	20 minutes	Ian Von Lindern
2002 Blood Lead Screening Results - Box	20 minutes	Ian Von Lindern

Project Updates:

Residential Yard Program
McKinley Avenue
South Fork Cd'A River Work
Rails to Trails



PANHANDLE HEALTH DISTRICT I

114 West Riverside Avenue
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Environmental Health
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WIC Clinics
Health Education
Family Planning
Well Child Conference
VD Clinics
Early and Periodic Screening
Immunizations

Institutional Controls Program
Lead Health Program
Phone: (208) 783-0707
Fax: (208) 783-4242

Summary: Bunker Hill Superfund Task Force Meeting - May 2, 2002

The meeting was called to order at 7:00 p.m.. Rob Hanson with the Department of Environmental Quality (DEQ) served as moderator.

Angela Chung USEPA and Scott Peterson (DEQ) noted that summer yard work was in question. To-date, Hecla has offered to do high risk yards. No word has been received from ASARCO. Economic hard times for the mining companies and the ruling from Judge Lodge have clouded the issue.

The State and EPA hope to pick up the difference in the number of yards done by the Upstream Mining Group (UMG) in order to maintain the pace of 200 yards per year. At present, EPA will have the US Army Corp. do 100 yards.

The Corp. hopes to begin work by mid-August. Work in Pinehurst is nearly done. Following Pinehurst, work will begin in south Kellogg on 4th Street and proceed down hill towards Portland. Work will continue until the weather forces the project to stop.

A bid notice will go out on 5/10/02. Two (2) contracts will be let, one for one-third of the work to be done as part of a program to assist economically disadvantaged contractors. The second contract for all remaining work will be open to all bidders.

Negotiations will continue with the UMG regarding their participation.

Duane Little, Task Force chairman, requested that the State improve the quality of soil being used in the yard program.

The soil stockpiled at the airport was obtained at no cost (other than hauling) from a project in the Cd'A area.

Cami Grandinetti USEPA stated that capping along McKinley Avenue will be completed this summer and that the road will be turned over to the City of Kellogg this fall. Kellogg will likely complete road repairs prior to opening next year.

2001 Bunker and Basin Blood Lead Levels

Idaho Dept. of Health and Welfare
Idaho Dept. of Environmental Quality
Panhandle Health District

Bunker Hill Superfund Site Remedial Action Goals

- 95% of all children in each community with blood lead levels < 10 µg/dl
- No children (i.e., <1%) with blood lead levels ≥ 15 µg/dl

2001 PHD Lead Health Intervention Program Procedures

- \$20.00 cash incentive for participants that live:
 - A) within the BHSS and are between 6 months and 9 years of age, or
 - B) within the CDA River Basin and are between 6 months and 6 years of age
- Prior to blood draws, the parent/legal guardian or adult participant must sign a Consent Form and complete the appropriate Questionnaire

2001 Blood Lead Summary Statistics – BHSS (age 0-9 years)

Total Number of Children (N)	322	
Minimum (µg/dl)	1.0	
Maximum (µg/dl)	18.0	
Average (µg/dl)	3.2	
Standard Deviation	2.4	
Geometric Mean (µg/dl)	2.7	
Geometric Standard Deviation	1.79	
Percentage		
Total Number of Children (N)	322	
Number of Children ≥ 10 µg/dl	10	3%
Number of Children ≥ 15 µg/dl	4	1%
Number of Children ≥ 20 µg/dl	0	0%

2001 Blood Lead Summary Statistics – BHSS (age 0-6 years)

Total Number of Children (N)	217	
Minimum (µg/dl)	1.4	
Maximum (µg/dl)	18.0	
Average (µg/dl)	3.6	
Standard Deviation	2.7	
Geometric Mean (µg/dl)	3.0	
Geometric Standard Deviation	1.81	
Percentage		
Total Number of Children (N)	217	
Number of Children ≥ 10 µg/dl	9	4%
Number of Children ≥ 15 µg/dl	4	2%
Number of Children ≥ 20 µg/dl	0	0%

2001 Blood Lead Summary Statistics – Basin (age 0-6 years)

Total Number of Children (N)	117	
Minimum (µg/dl)	1.4	
Maximum (µg/dl)	16.0	
Average (µg/dl)	4.5	
Standard Deviation	2.9	
Geometric Mean (µg/dl)	3.7	
Geometric Standard Deviation	1.82	
Percentage		
Total Number of Children (N)	117	
Number of Children ≥ 10 µg/dl	7	6%
Number of Children ≥ 15 µg/dl	2	2%
Number of Children ≥ 20 µg/dl	0	0%

2001 Blood Lead Summary Statistics – Basin by Area

	Kingston	Lower Basin	Mullen	Osburn	Side Guiches*	Wallace*
N	32	19	10	23	21	12
Min (µg/dl)	1.4	1.4	2.2	1.4	1.4	1.6
Max (µg/dl)	7.7	16.0	9.2	11.0	16.0	12.0
Ave (µg/dl)	3.8	4.2	5.5	3.4	5.4	6.3
St. Dev.	2.0	3.6	2.6	2.0	3.6	3.0
GeoMean (µg/dl)	3.3	3.4	4.9	3.0	4.6	5.5
Geo St. Dev.	1.79	1.93	1.71	1.62	1.78	1.75

* Includes 3 samples from Silverton

* Includes 2 samples from Burke/Nine Mile

2001 Blood Lead Summary Statistics – Basin by Area

	Kingston	Lower Basin	Mullen	Osburn	Side Guiches*	Wallace*
N	32	19	10	23	21	12
N ≥ 10 µg/dl	0	2	0	1	3	1
% ≥ 10 µg/dl	0%	11%	0%	4%	14%	8%
N ≥ 15 µg/dl	0	1	0	0	1	0
% ≥ 15 µg/dl	0%	5%	0%	0%	5%	0%
N ≥ 20 µg/dl	0	0	0	0	0	0
% ≥ 20 µg/dl	0%	0%	0%	0%	0%	0%

* Includes 3 samples from Silverton

* Includes 2 samples from Burke/Nine Mile

2001 Blood Lead Summary Statistics - Basin by Age (years)

	1	2	3	4	5	6
N	28	17	18	19	16	19
Min (µg/dl)	1.4	1.4	1.4	1.4	1.4	1.4
Max (µg/dl)	12.1	10.0	16.0	16.0	7.3	9.0
Ave (µg/dl)	3.8	4.4	5.7	5.6	3.5	4.2
St. Dev.	2.5	2.7	3.7	3.8	1.6	2.2
GeoMean (µg/dl)	3.2	3.7	4.7	4.6	3.1	3.7
Geo St. Dev.	1.81	1.83	1.90	1.90	1.65	1.68

2001 Blood Lead Summary Statistics - Basin by Age (years)

	1	2	3	4	5	6
N	28	17	18	19	16	19
N ≥ 10 µg/dl	1	1	2	3	0	0
% ≥ 10 µg/dl	4%	6%	11%	16%	0%	0%
N ≥ 15 µg/dl	0	0	1	1	0	0
% ≥ 15 µg/dl	0%	0%	6%	5%	0%	0%
N ≥ 20 µg/dl	0	0	0	0	0	0
% ≥ 20 µg/dl	0%	0%	0%	0%	0%	0%

2001 Blood Lead Summary Statistics - Basin by Year (age 0-6 only)

	1996	1997	1998	1999	2000	2001
N	58	13	70	162	102	117
Min (µg/dl)	1.0	2.0	2.0	1.0	1.0	1.4
Max (µg/dl)	18.0	19.0	21.0	29.0	27.0	16.0
Ave (µg/dl)	5.2	6.0	6.3	6.4	5.8	4.5
St. Dev.	3.8	4.7	4.1	4.6	4.0	2.9
GeoMean (µg/dl)	4.2	4.9	5.4	5.2	4.8	3.7
Geo St. Dev.	1.94	1.84	1.72	1.96	1.87	1.82

2001 Blood Lead Summary Statistics - Basin by Year (age 0-6 only)

	1996	1997	1998	1999	2000	2001
N	58	13	70	162	102	117
N ≥ 10 µg/dl	8	2	9	26	14	7
% ≥ 10 µg/dl	14%	15%	13%	16%	14%	6%
N ≥ 15 µg/dl	3	1	4	12	4	2
% ≥ 15 µg/dl	5%	8%	6%	7%	4%	2%
N ≥ 20 µg/dl	0	0	2	4	1	0
% ≥ 20 µg/dl	0%	0%	3%	3%	1%	0%

Annual Blood Lead Summary Data by Geographic Subarea for Children ($\mu\text{g}/\text{dl}$)

(Age 0 - 6)

Year	Mullan Area									
	Number of Observations				Arithmetic Mean	Standard Deviation	Geometric Mean	Geo St. Deviation	Minimum	Maximum
1996	6	0	0	0	3.3	1.4	3.1	1.51	2.0	5.0
1997	0	-	-	-	-	-	-	-	-	-
1998	2	-	-	-	-	-	-	-	-	-
1999	9	2	0	0	7.0	3.0	6.5	1.54	3.0	12.0
2000	3	-	-	-	-	-	-	-	-	-
2001	10	0	0	0	5.5	2.6	4.9	1.71	2.2	9.2
Burke/Nine Mile Area										
1996	6	1	0	0	5.5	3.5	4.5	2.04	2.0	10.0
1997	3	-	-	-	-	-	-	-	-	-
1998	12	4	3	2	9.1	7.1	6.9	2.14	2.0	21.0
1999	18	3	2	1	8.2	4.5	7.3	1.60	3.0	20.0
2000	1	-	-	-	-	-	-	-	-	-
2001	2	-	-	-	-	-	-	-	-	-
Wallace Area										
1996	7	1	0	0	5.7	3.4	4.8	1.97	2.0	11.0
1997	0	-	-	-	-	-	-	-	-	-
1998	15	4	1	0	7.9	3.8	7.0	1.70	2.0	16.0
1999	21	5	3	2	8.2	6.8	6.4	1.98	2.0	29.0
2000	9	2	0	0	6.8	3.5	6.1	1.58	3.0	14.0
2001	10	1	0	0	5.7	3.0	5.0	1.76	1.6	12.0
Silverton Area										
1996	12	2	1	0	5.8	4.0	4.8	1.88	2.0	16.0
1997	3	-	-	-	-	-	-	-	-	-
1998	17	0	0	0	4.9	1.5	4.7	1.41	2.0	8.0
1999	19	4	2	1	6.7	5.4	5.2	2.08	2.0	23.0
2000	13	2	1	0	6.2	4.2	5.1	1.92	2.0	17.0
2001	3	-	-	-	-	-	-	-	-	-
Osborn Area										
1996	8	0	0	0	4.0	1.2	3.9	1.33	3.0	6.0
1997	4	0	0	0	4.8	1.7	4.5	1.43	3.0	7.0
1998	7	0	0	0	5.7	2.0	5.3	1.59	2.0	8.0
1999	33	3	0	0	4.8	2.7	4.0	1.89	1.0	11.0
2000	25	2	1	0	5.0	3.1	4.3	1.75	2.0	15.0
2001	23	1	0	0	3.4	2.0	3.0	1.62	1.4	11.0
Side Gulches Area										
1996	5	0	0	0	2.8	1.3	2.5	1.79	1.0	4.0
1997	0	-	-	-	-	-	-	-	-	-
1998	8	0	0	0	4.5	1.6	4.3	1.42	3.0	7.0
1999	19	0	0	0	4.4	2.0	4.0	1.66	1.0	9.0
2000	20	1	0	0	4.9	2.2	4.5	1.55	2.0	10.0
2001	18	2	0	0	5.1	2.8	4.5	1.67	1.4	12.1
Kingston Area										
1996	7	1	1	0	6.4	4.7	5.2	1.99	2.0	16.0
1997	0	-	-	-	-	-	-	-	-	-
1998	5	0	0	0	3.6	2.0	3.3	1.58	2.0	7.0
1999	22	5	3	0	6.1	5.0	4.4	2.41	1.0	16.0
2000	16	2	0	0	5.1	3.7	4.0	2.16	1.0	14.0
2001	32	0	0	0	3.8	2.0	3.3	1.79	1.4	7.7
Lower Basin/Cataldo Area										
1996	7	3	1	0	6.7	6.4	4.2	2.96	1.0	18.0
1997	3	-	-	-	-	-	-	-	-	-
1998	4	1	0	0	6	4.8	4.9	2.00	3.0	13.0
1999	21	4	2	0	7.3	4.3	6.3	1.74	3.0	18.0
2000	14	3	2	1	7.4	7.0	5.3	2.31	1.0	27.0
2001	19	2	1	0	4.2	3.6	3.4	1.93	1.4	16.0

2001 Bunker and Basin Blood Lead Levels

Idaho Dept. of Health and Welfare
Idaho Dept. of Environmental Quality
Panhandle Health District

Bunker Hill Superfund Site Remedial Action Goals

- **95% of all children in each community with blood lead levels $< 10 \mu\text{g/dl}$**
- **No children (i.e., $<1\%$) with blood lead levels $\geq 15 \mu\text{g/dl}$**

2001 PHD Lead Health Intervention Program Procedures

- **\$20.00 cash incentive for participants that live:**
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Geometric Standard Deviation	1.79

Percentage		
Total Number of Children (N)	322	
Number of Children ≥ 10 µg/dl	10	3%
Number of Children ≥ 15 µg/dl	4	1%
Number of Children ≥ 20 µg/dl	0	0%

2001 Blood Lead Summary Statistics – BHSS (age 0-6 years)

Total Number of Children (N)	217
Minimum ($\mu\text{g/dl}$)	1.4
Maximum ($\mu\text{g/dl}$)	18.0
Average ($\mu\text{g/dl}$)	3.6
Standard Deviation	2.7
Geometric Mean ($\mu\text{g/dl}$)	3.0
Geometric Standard Deviation	1.81

		Percentage
Total Number of Children (N)	217	
Number of Children $\geq 10 \mu\text{g/dl}$	9	4%
Number of Children $\geq 15 \mu\text{g/dl}$	4	2%
Number of Children $\geq 20 \mu\text{g/dl}$	0	0%

2001 Blood Lead Summary Statistics – Basin (age 0-6 years)

Total Number of Children (N)	117
Minimum ($\mu\text{g/dl}$)	1.4
Maximum ($\mu\text{g/dl}$)	16.0
Average ($\mu\text{g/dl}$)	4.5
Standard Deviation	2.9
Geometric Mean ($\mu\text{g/dl}$)	3.7
Geometric Standard Deviation	1.82

		Percentage
Total Number of Children (N)	117	
Number of Children $\geq 10 \mu\text{g/dl}$	7	6%
Number of Children $\geq 15 \mu\text{g/dl}$	2	2%
Number of Children $\geq 20 \mu\text{g/dl}$	0	0%

BHSS Lead Health Intervention

Summary Statistics 1988-1994

Year	Number children in survey	Mean Blood Pb ($\mu\text{g/dl}$)	Number of children blood leads ($\mu\text{g/dl}$)			Percent Children ≥ 10
			≥ 25	≥ 15	≥ 10	
1988*	230	9.9	7	35	105	46%
1989*	275	11.4	8	71	154	56%
1990	362	8.9	2	41	134	37%
1991	365	6.3	2	17	56	15%
1992	415	7.4	3	31	110	27%
1993	445	5.6	1	10	66	15%
1994	416	6.2	1	15	71	17%

*does not include Pinehurst

BHSS Lead Health Intervention Summary Statistics 1995-2001

Year	Number children in survey	Mean Blood Pb ($\mu\text{g/dl}$)	Number of children blood leads ($\mu\text{g/dl}$)			Percent Children ≥ 10
			≥ 25	≥ 15	≥ 10	
1995	405	6.0	2	20	62	15%
1996	397	5.8	2	13	49	12 %
1997	337	5.4	0	6	36	11 %
1998	375	4.8	0	5	31	8%
1999	370	4.7	0	3	23	6%
2000	320	4.3	0	5	17	5%
2001	322	3.2	0	4	10	3%

*does not include Pinehurst

2001 Blood Lead Summary Statistics – BHSS by Town

	Kellogg	Pinehurst	Wardner	Page	Smelterville
N	182	101	9	7	23
Min (µg/dl)	1.4	1.0	1.4	1.4	1.4
Max (µg/dl)	18.0	11.0	11.5	9.4	7.7
Ave (µg/dl)	3.4	2.7	4.3	4.7	2.8
St. Dev.	2.7	1.8	3.4	3.3	1.8
GeoMean (µg/dl)	2.8	2.4	3.3	3.7	2.4
Geo St. Dev.	1.79	1.70	2.22	2.08	1.72

2001 Blood Lead Summary

Statistics - BHSS by Town

	Kellogg	Pinehurst	Wardner	Page	Smelterville
N	182	101	9	7	23
N \geq 10 $\mu\text{g/dl}$	7	2	1	0	0
% \geq 10 $\mu\text{g/dl}$	4%	2%	11%	0%	0%
N \geq 15 $\mu\text{g/dl}$	4	0	0	0	0
% \geq 15 $\mu\text{g/dl}$	2%	0%	0%	0%	0%
N \geq 20 $\mu\text{g/dl}$	0	0	0	0	0
% \geq 20 $\mu\text{g/dl}$	0%	0%	0%	0%	0%

2001 Blood Lead Summary

Statistics - BHSS by Age (years)

	1	2	3	4	5	6	7	8	9
N	45	41	40	23	35	33	35	25	45
Min (µg/dl)	1.4	1.4	1.4	1.4	1.4	1.4	1.0	1.4	1.0
Max (µg/dl)	18.0	16.0	10.0	16.0	7.0	17.0	4.8	12.0	6.6
Ave (µg/dl)	3.7	4.6	3.3	3.9	2.5	3.4	2.5	2.4	2.5
St. Dev.	2.9	3.1	1.8	3.4	1.5	2.9	1.0	2.2	1.5
GeoMean (µg/dl)	3.1	3.8	2.9	3.0	2.2	2.7	2.3	2.0	2.2
Geo St. Dev.	1.78	1.83	1.62	2.02	1.65	1.86	1.54	1.71	1.68

2001 Blood Lead Summary Statistics - BHSS by Age (years)

[illegible]

2001 Blood Lead Summary

Statistics – Basin by Area

	Kingston	Lower Basin	Mullan	Osburn	Side Gulches ^a	Wallace ^b
N	32	19	10	23	21	12
Min (µg/dl)	1.4	1.4	2.2	1.4	1.4	1.6
Max (µg/dl)	7.7	16.0	9.2	11.0	16.0	12.0
Ave (µg/dl)	3.8	4.2	5.5	3.4	5.4	6.3
St. Dev.	2.0	3.6	2.6	2.0	3.6	3.0
GeoMean (µg/dl)	3.3	3.4	4.9	3.0	4.6	5.5
Geo St. Dev.	1.79	1.93	1.71	1.62	1.78	1.75

^a includes 3 samples from Silverton

^b includes 2 samples from Burke/Nine Mile

2001 Blood Lead Summary

Statistics – Basin by Area

	Kingston	Lower Basin	Mullan	Osburn	Side Gulches ^a	Wallace ^b
N	32	19	10	23	21	12
N \geq 10 μ g/dl	0	2	0	1	3	1
% \geq 10 μ g/dl	0%	11%	0%	4%	14%	8%
N \geq 15 μ g/dl	0	1	0	0	1	0
% \geq 15 μ g/dl	0%	5%	0%	0%	5%	0%
N \geq 20 μ g/dl	0	0	0	0	0	0
% \geq 20 μ g/dl	0%	0%	0%	0%	0%	0%

^a includes 3 samples from Silverton

^b includes 2 samples from Burke/Nine Mile

2001 Blood Lead Summary

Statistics - Basin by Age (years)

	1	2	3	4	5	6
N	28	17	18	19	16	19
Min (µg/dl)	1.4	1.4	1.4	1.4	1.4	1.4
Max (µg/dl)	12.1	10.0	16.0	16.0	7.3	9.0
Ave (µg/dl)	3.8	4.4	5.7	5.6	3.5	4.2
St. Dev.	2.5	2.7	3.7	3.8	1.6	2.2
GeoMean (µg/dl)	3.2	3.7	4.7	4.6	3.1	3.7
Geo St. Dev.	1.81	1.83	1.90	1.90	1.65	1.68

2001 Blood Lead Summary

Statistics - Basin by Age (years)

	1	2	3	4	5	6
N	28	17	18	19	16	19
N \geq 10 $\mu\text{g/dl}$	1	1	2	3	0	0
% \geq 10 $\mu\text{g/dl}$	4%	6%	11%	16%	0%	0%
N \geq 15 $\mu\text{g/dl}$	0	0	1	1	0	0
% \geq 15 $\mu\text{g/dl}$	0%	0%	6%	5%	0%	0%
N \geq 20 $\mu\text{g/dl}$	0	0	0	0	0	0
% \geq 20 $\mu\text{g/dl}$	0%	0%	0%	0%	0%	0%

2001 Blood Lead Summary

Statistics - Basin by Year (age 0-6 only)

	1996	1997	1998	1999	2000	2001
N	58	13	70	162	102	117
Min (µg/dl)	1.0	2.0	2.0	1.0	1.0	1.4
Max (µg/dl)	18.0	19.0	21.0	29.0	27.0	16.0
Ave (µg/dl)	5.2	6.0	6.3	6.4	5.8	4.5
St. Dev.	3.8	4.7	4.1	4.6	4.0	2.9
GeoMean (µg/dl)	4.2	4.9	5.4	5.2	4.8	3.7
Geo St. Dev.	1.94	1.84	1.72	1.96	1.87	1.82

2001 Blood Lead Summary

Statistics - Basin by Year (age 0-6 only)

	1996	1997	1998	1999	2000	2001
N	58	13	70	162	102	117
N \geq 10 $\mu\text{g/dl}$	8	2	9	26	14	7
% \geq 10 $\mu\text{g/dl}$	14%	15%	13%	16%	14%	6%
N \geq 15 $\mu\text{g/dl}$	3	1	4	12	4	2
% \geq 15 $\mu\text{g/dl}$	5%	8%	6%	7%	4%	2%
N \geq 20 $\mu\text{g/dl}$	0	0	2	4	1	0
% \geq 20 $\mu\text{g/dl}$	0%	0%	3%	3%	1%	0%

**Basin Annual Blood Lead Summary Data by Geographic Subarea for Children ($\mu\text{g}/\text{dl}$)
(Age 0 - 6)**

Year	Number of Observations				Mullan Area					
	Total	$\geq 10\mu\text{g}/\text{dl}$	$\geq 15\mu\text{g}/\text{dl}$	$\geq 20\mu\text{g}/\text{dl}$	Arithmetic Mean	Standard Deviation	Geometric Mean	Geo St. Deviation	Minimum	Maximum
1996	6	0	0	0	3.3	1.4	3.1	1.51	2.0	5.0
1997	0	-	-	-	-	-	-	-	-	-
1998	2	-	-	-	-	-	-	-	-	-
1999	9	2	0	0	7.0	3.0	6.5	1.54	3.0	12.0
2000	3	-	-	-	-	-	-	-	-	-
2001	10	0	0	0	5.5	2.6	4.9	1.71	2.2	9.2
Burke/Nine Mile Area										
1996	6	1	0	0	5.5	3.5	4.5	2.04	2.0	10.0
1997	3	-	-	-	-	-	-	-	-	-
1998	12	4	3	2	9.1	7.1	6.9	2.14	2.0	21.0
1999	18	3	2	1	8.2	4.5	7.3	1.60	3.0	20.0
2000	1	-	-	-	-	-	-	-	-	-
2001	2	-	-	-	-	-	-	-	-	-
Wallace Area										
1996	7	1	0	0	5.7	3.4	4.8	1.97	2.0	11.0
1997	0	-	-	-	-	-	-	-	-	-
1998	15	4	1	0	7.9	3.8	7.0	1.70	2.0	16.0
1999	21	5	3	2	8.2	6.8	6.4	1.98	2.0	29.0
2000	9	2	0	0	6.8	3.5	6.1	1.58	3.0	14.0
2001	10	1	0	0	5.7	3.0	5.0	1.76	1.6	12.0
Silverton Area										
1996	12	2	1	0	5.8	4.0	4.8	1.88	2.0	16.0
1997	3	-	-	-	-	-	-	-	-	-
1998	17	0	0	0	4.9	1.5	4.7	1.41	2.0	8.0
1999	19	4	2	1	6.7	5.4	5.2	2.08	2.0	23.0
2000	13	2	1	0	6.2	4.2	5.1	1.92	2.0	17.0
2001	3	-	-	-	-	-	-	-	-	-
Osburn Area										
1996	8	0	0	0	4.0	1.2	3.9	1.33	3.0	6.0
1997	4	0	0	0	4.8	1.7	4.5	1.43	3.0	7.0
1998	7	0	0	0	5.7	2.0	5.3	1.59	2.0	8.0
1999	33	3	0	0	4.8	2.7	4.0	1.89	1.0	11.0
2000	25	2	1	0	5.0	3.1	4.3	1.75	2.0	15.0
2001	23	1	0	0	3.4	2.0	3.0	1.62	1.4	11.0
Side Gulches Area										
1996	5	0	0	0	2.8	1.3	2.5	1.79	1.0	4.0
1997	0	-	-	-	-	-	-	-	-	-
1998	8	0	0	0	4.5	1.6	4.3	1.42	3.0	7.0
1999	19	0	0	0	4.4	2.0	4.0	1.66	1.0	9.0
2000	20	1	0	0	4.9	2.2	4.5	1.55	2.0	10.0
2001	18	2	0	0	5.1	2.8	4.5	1.67	1.4	12.1
Kingston Area										
1996	7	1	1	0	6.4	4.7	5.2	1.99	2.0	16.0
1997	0	-	-	-	-	-	-	-	-	-
1998	5	0	0	0	3.6	2.0	3.3	1.58	2.0	7.0
1999	22	5	3	0	6.1	5.0	4.4	2.41	1.0	16.0
2000	16	2	0	0	5.1	3.7	4.0	2.16	1.0	14.0
2001	32	0	0	0	3.8	2.0	3.3	1.79	1.4	7.7
Lower Basin/Cataldo Area										
1996	7	3	1	0	6.7	6.4	4.2	2.96	1.0	18.0
1997	3	-	-	-	-	-	-	-	-	-
1998	4	1	0	0	6	4.8	4.9	2.00	3.0	13.0
1999	21	4	2	0	7.3	4.3	6.3	1.74	3.0	18.0
2000	14	3	2	1	7.4	7.0	5.3	2.31	1.0	27.0
2001	19	2	1	0	4.2	3.6	3.4	1.93	1.4	16.0

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA and)
STATE OF IDAHO,)
 Plaintiffs,)
vs.) No. CV94-206-N-EJL
ASARCO INCORPORATED; COEUR)
D'ALENE MINES CORPORATION;) VOLUME I
CALLAHAN MINING CORPORATION;)
HECLA MINING COMPANY; SUNSHINE)
PRECIOUS METALS; SUNSHINE)
MINING COMPANY,)
 Defendants.)
-----)

BEFORE THE HONORABLE EDWARD J. LODGE
HECLA AND ASARCO'S HEARING TO
MODIFY CONSENT DECREE
SEPTEMBER 18, 2001
9:00 A.M.

1 DEFENDANTS' WITNESSES:

2 ARTHUR BROWN:

3	Direct Examination by Mr. Wielga	29
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9 J. CHRISTOPHER PFAHL:

10	Direct Examination by Mr. Silverman	106
11	Direct Examination by Mr. Wielga	159
12	Cross-Examination by Mr. Stone	160
13	Cross-Examination by Mr. Fransen	195
14	Redirect Examination by Mr. Silverman	198
15	Recross-Examination by Mr. Stone	208

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1 Honor.

2 THE COURT: Thank you, sir, you may
3 step down.

4 MR. NICKLES: Your Honor, Mr. Silverman
5 will present Mr. Pfahl, ASARCO's witness.

6 THE COURT: ASARCO may call its first
7 witness.

8 MR. SILVERMAN: Your Honor, ASARCO
9 calls J.C. Pfahl to the stand.

10 MR. SILVERMAN: Your Honor, can I have
11 a moment? I am just going to hand up an
12 illustrative that we will be using later.

13 J. CHRISTOPHER PFAHL,
14 first duly sworn to tell the truth relating to
15 said cause, testified as follows:

16 THE CLERK: Please state your full
17 name and spell your last name for the record.

18 THE WITNESS: John Christopher Pfahl,
19 P-F-A-H-L.

20 THE CLERK: Thank you.

21 DIRECT EXAMINATION

22 QUESTIONS BY MR. SILVERMAN:

23 Q. Good morning, Mr. Pfahl. You are in a
24 your familiar chair once again.

25 A. Good morning.

1 MR. SILVERMAN: With the Court's
2 indulgence, I think we are going to try to breeze
3 through Mr. Pfahl's background as the parties
4 have heard at length how he knows everything
5 about everything.

6 BY MR. SILVERMAN:

7 Q. Mr. Pfahl, how long have you been an
8 employee of ASARCO?

9 A. Twenty-four and a half years.

10 Q. And during that time what has been your
11 title with the company?

12 A. I started out as a mining engineer in a
13 mining operation and was promoted up into the
14 administrative of the Northwest Mining Partners
15 as a chief mining engineer. After termination of
16 that department I was -- my title was changed to
17 site manager for the closed-plant department of
18 ASARCO. That is the title I currently have.

19 Q. And within your history at the company,
20 at what point did you play a new role in closed
21 sites within the Coeur d'Alene Basin?

22 A. The Coeur d'Alene Basin became an issue
23 on the notice letter from EPA naming ASARCO and
24 others as PRPs for the Bunker Hill site. I
25 believe that was in late 1989.

1 Q. And following the time of that notice
2 letter naming ASARCO and others as PRPs, how did
3 your role evolve with respect to that
4 designation?

5 A. The management of ASARCO put me in
6 charge of that issue as site manager for the
7 Bunker Hill Superfund site.

8 Q. And today do you have among your duties
9 duties related to administration of the consent
10 decree that is at issue in this courtroom?

11 A. Yes.

12 Q. And can you just generally describe
13 what those duties are?

14 A. A group known as the Upstream Mining
15 Group, which now consists of ASARCO and Hecla, is
16 undertaking all the actions agreed to under the
17 consent decree. Both Hecla and ASARCO have a
18 representative to the Upstream Mining Group and I
19 am ASARCO's representative.

20 In addition, ASARCO has the accounting
21 responsibility for the activities undertaken by
22 the Upstream Mining Group and I am the treasurer,
23 and, therefore, I pay all the bills.

24 Q. So Mr. Pfahl, you are aware then of
25 what the costs have been in terms of compliance

1 with that consent decree?

2 A. Yes, intimately.

3 Q. And are you also aware of what work has
4 been done pursuant to the consent decree?

5 A. Yes.

6 Q. To take you back to the letter of
7 notice naming ASARCO as a PRP, following that
8 date, what role did you have with respect to the
9 EPA's action?

10 A. I worked with the attorneys for ASARCO
11 as the technical representative.

12 Q. And what did that mean to be the
13 technical representative working with the
14 attorneys with respect to this naming of ASARCO
15 as the PRP?

16 A. I attended virtually all of the
17 negotiations that went on between the EPA
18 technical representatives and company technical
19 representatives, as well as the negotiating
20 meetings that had a little broader attendance
21 that included a lot more attorneys and in many
22 cases, ASARCO and Hecla management people.

23 Q. What actions did the EPA take following
24 the notice letter and up to 1992?

25 A. I believe soon after the notice letter

1 that we began to get requests for funding to
2 begin undertaking emergency removal actions
3 within the Superfund site.

4 Q. And what was the companies' response to
5 those administrative orders or directives?

6 A. Once we received those directives, all
7 the companies, including Gulf Resources, began to
8 work together. And we entered into a number of
9 administrative orders with the EPA to undertake
10 those emergency removal actions.

11 Q. And where just generally were emergency
12 removals performed funded by ASARCO, Hecla and
13 the others?

14 A. The emergency removals were primarily
15 directed to residential areas and what were
16 called high-risk populations that lived within
17 the Superfund site.

18 MR. STONE: Your Honor, at this point I
19 raise an objection that as background, a certain
20 degree of this we think is fine. But to the
21 extent we get into lots of stuff about what
22 happened before the consent decree negotiations
23 began before it was signed, I would ask that Your
24 Honor limit it to that, to the testimony that has
25 been given.

1 MR. SILVERMAN: Your Honor, it is not
2 our intention to go into this at length. We do
3 feel since this case was previously before Judge
4 Ryan that a certain amount of background is
5 helpful to the Court in understanding the posture
6 of when negotiations began.

7 THE COURT: Background information.
8 Overruled.

9 BY MR. SILVERMAN:

10 Q. Mr. Pfahl, did ASARCO and yourself in
11 particular have any really role to play with
12 respect to ongoing remedial investigations within
13 the Box?

14 A. The State of Idaho was undertaking the
15 RI/FS associated with populated areas of the
16 site. The companies worked with EPA and got
17 control of the RI/FS for the nonpopulated area of
18 the site. This would be the pre-1992 ROD?

19 Q. And how did it come about that ASARCO
20 had a role to play in the RI/FS for nonpopulated
21 areas within the Box? Could you just describe
22 how that happened?

23 A. Gulf Resources and Pintlar were
24 undertaking that RI/FS. After we were named as
25 PRPs in the site, Gulf began bringing the mining

1 companies into those negotiations and we began
2 looking at our various liabilities amongst the
3 companies and who was responsible for what.
4 ASARCO became involved in that RI/FS project soon
5 after we were named a PRP.

6 Q. Now, Mr. Pfahl, did ASARCO have any
7 historic mining operations within the area known
8 as the Box, the 21-square-mile area?

9 MR. STONE: Your Honor, I object on
10 relevance.

11 THE COURT: Sustain the objection.

12 BY MR. SILVERMAN:

13 Q. You mentioned, Mr. Pfahl, that the
14 parties were entering discussions amongst
15 themselves with respect to responsibilities
16 within the Box. Could you briefly describe what
17 those discussions concerned?

18 MR. STONE: Objection, relevance.

19 MR. FRANSEN: Objection.

20 MR. SILVERMAN: Your Honor, I will tie
21 it up. It is directly related.

22 THE COURT: Overruled subject to motion
23 to strike.

24 THE WITNESS: Soon after the companies,
25 mining companies were brought into the RI/FS

1 project, all of the companies put together what
2 was called a master plan, which was a
3 comprehensive site-wide cleanup plan. The
4 companies then worked out various allocation
5 methods for allocating liability for the various
6 components of that plan amongst themselves. In
7 fact, those negotiations ultimately resulted in a
8 settlement between the mining companies and Gulf
9 Resources outlining who was responsible for which
10 areas of the site.

11 BY MR. SILVERMAN:

12 Q. Now, you have mentioned that both the
13 State and the EPA were involved at the site.
14 Were they aware of these discussions amongst the
15 mining companies with respect to how to allocate
16 their obligations with respect to the site?

17 A. Those discussions would not have
18 been -- our intentions would not have been given
19 to EPA until soon before the ROD was issued.

20 MR. STONE: Your Honor, I would move to
21 strike at this point. I don't think this has
22 been tied up. The witness just testified that
23 these are -- this was an agreement between
24 parties that didn't involve the Environmental
25 Protection Agency.

1 MR. SILVERMAN: Your Honor, this
2 agreement between parties later became the
3 foundation during the consent decree negotiations
4 for the companies' good faith proposal. It was,
5 if you will, the starting off point for what
6 happened during the negotiations. So I feel it
7 is important for the Court to understand because
8 later when Gulf went bankrupt, it upset the
9 previous posture of these negotiations. And they
10 were built upon the internal discussions which he
11 is recounting for the Court.

12 THE COURT: Background information.
13 Overruled.

14 BY MR. SILVERMAN:

15 Q. Mr. Pfahl, I believe you were
16 mentioning that later on after the ROD was
17 issued -- and do you mean the ROD in 1992 for
18 nonpopulated areas of the Box?

19 A. That is correct.

20 Q. And you were saying that after that ROD
21 was issued, in your understanding, then the State
22 and EPA became aware of the allocation amongst
23 the mining companies of their obligations with
24 respect to the site?

25 MR. FRANSEN: Objection, Your Honor,

1 that question was asked and answered.

2 THE COURT: I am pretty sure it was
3 asked. I don't recall what the answer was so I
4 am going to overrule your objection.

5 Go ahead and answer.

6 THE WITNESS: After the ROD was issued,
7 negotiations and discussions began with all of
8 the parties, including the State and Federal
9 government, where the mining companies and Gulf
10 became -- again, laid out their intentions. I
11 think some of this is evident when you read the
12 various letters that went back and forth between
13 the company management and the EPA.

14 BY MR. SILVERMAN:

15 Q. And were the negotiations that
16 commenced following the issuance of the ROD in
17 1992, are those the negotiations the same
18 negotiations that led up to the 1994 consent
19 decree, in your understanding?

20 A. Yes.

21 Q. Mr. Pfahl, during this time period were
22 you privy to correspondence from the EPA
23 discussing their approaches to environmental
24 issues in the Basin?

25 A. Yes, I was.

1 Q. And can you describe how you would
2 receive such correspondence in the ordinary
3 course of your duties for ASARCO?

4 A. Well, any correspondence that would
5 have been addressed to Michael Thorp or to ASARCO
6 management would have ultimately made its way
7 down to my office as I was the local person in
8 charge of the Superfund project.

9 Q. I am going to ask you to turn in the
10 binder of Defendants' joint exhibits for ASARCO
11 and Hecla to Tab A, which is Defendants' Exhibit
12 A. Do you recognize this exhibit, Mr. Pfahl?

13 A. Yes.

14 Q. And do you recall receiving this
15 correspondence on or about the time it was
16 received in November of 1991?

17 A. Yes, I would have been sent a copy of
18 this correspondence.

19 Q. Did this correspondence addressed from
20 Ms. Dana Rasmussen to Congressman LaRocco play a
21 part in your understanding in the companies'
22 negotiations with the government?

23 A. Yes, it did.

24 Q. And what part did it play, in your
25 understanding in those negotiations?

1 A. Well, I think the companies were
2 attempting to limit the Superfund project to the
3 21-square-mile site in an attempt to get
4 everybody on board to a different approach
5 outside the site, what has been referred to as
6 the multimedia approach.

7 Q. Did you yourself, did your office for
8 ASARCO have any interactions with Congressman
9 LaRocco related to this site?

10 A. My office did not. I am sure ASARCO's
11 PR people were involved with Congressman LaRocco.

12 MR. SILVERMAN: Your Honor, ASARCO
13 moves Defendants' Exhibit A in evidence.

14 MR. STONE: No objection, Your Honor.

15 MR. FRANSEN: None.

16 THE COURT: Defendants' Exhibit A is
17 admitted.

18 (Defendants' Exhibit A admitted.)

19 BY MR. SILVERMAN:

20 Q. Mr. Pfahl, at the time the Record of
21 Decision for the nonpopulated areas of the Basin
22 was issued, was that a document that you became
23 familiar with?

24 A. Yes.

25 Q. And what was your understanding of the

1 work laid out in that document just generally?

2 A. That Record of Decision covered the
3 nonpopulated portions of the site.

4 Q. Did that Record of Decision make
5 mention of the EPA's approach to contamination
6 upstream and downstream of the site?

7 A. Yes, that Record of Decision was issued
8 soon after the letter to the congressman was put
9 out. I think it used similar language to what
10 was in the letter to the congressman stating that
11 a different approach would be used outside the
12 Superfund site.

13 Q. And if I could direct you to Tab F of
14 the binders, Defendants' Exhibit F, maybe I will
15 just place it on the Elmo, but I would like to
16 direct you to 4-2 of that document. I will
17 direct your attention to the paragraph beginning,
18 "Actions selected in this Record of Decision do
19 not address sources of contamination upgradient."
20 What was your understanding of the EPA's stated
21 position about the scope of the ROD?

22 A. Well, when we had been working on the
23 RI/FS for the nonpopulated area and discussing
24 ROD issues with the EPA amongst the technical
25 people, it was obvious that something had to be

1 done upstream at the site particularly in order
2 to meet water quality issues inside of the site.
3 It seemed to be the will of everybody involved
4 that this not be done with CERCLA, that other
5 authorities be used at the time the Silver Valley
6 Trustees were beginning to look at these issues
7 and I think the ROD then kind of memorialized
8 what the technical people had been discussing
9 during numerous meetings, which was to do --
10 handle the areas up and downstream of the site
11 under different authorities.

12 Q. Did the ROD make any reference, in your
13 understanding, to the listing of areas outside
14 the Box on the NPL?

15 A. It made no reference to listing. I see
16 references that the Coeur d'Alene Basin
17 Restoration Project was being implemented, it was
18 expected to be the --

19 Q. And what was your understanding of how
20 CERCLA fit in then to areas upstream and
21 downstream of the Box as of the time of this
22 Record of Decision?

23 A. Well, I believe everybody had agreed
24 that CERCLA would be used, but they would not be
25 named a Superfund site. That CERCLA emergency

1 response actions and non-time-critical response
2 actions would be the tools used outside the
3 site and that did not necessitate listing the
4 entire Coeur d'Alene Basin as a Superfund site.

5 Q. Let me turn your attention now to page
6 A-2 of the same document, Defendants' Exhibit F
7 and I want to direct your attention to the
8 paragraph Beginning, "The Coeur d'Alene Tribe of
9 Idaho and the Federal natural resource trustees."
10 Could you please read that paragraph?

11 A. "The Coeur d'Alene Tribe of Idaho and
12 the Federal natural resource trustees have
13 recommended that a fifth alternative, one
14 requiring a total restoration of the entire
15 Basin, should be considered. Elements of a
16 "total restoration alternative," (such as the
17 total removal of all jig tailings within the
18 site) were evaluated in the feasibility study
19 process and rejected as technically
20 impracticable. Further, other remedial
21 activities both upstream and downstream of the
22 site are not within the scope of this ROD and
23 will be addressed under the Coeur d'Alene Basin
24 Restoration Project."

25 Q. And when the ROD made reference to its

1 scope and stated that those areas would be
2 addressed within the Coeur d'Alene Basin
3 Restoration Project, how did you understand that
4 those areas would be addressed within that
5 project as it existed at this time?

6 A. Well, the companies were involved in
7 developing the Coeur d'Alene Basin Restoration
8 Project and in the management of that project.
9 And I believe it was our position that it would
10 be a cooperative effort on the part of all the
11 parties, including the State, the Federal
12 government and the mining companies and the Tribe
13 to address issues both upstream and downstream of
14 the site without expanding the Superfund site
15 boundaries.

16 Q. Let me just have your understanding as
17 to why at this point persons seem to have felt it
18 was a good approach to take to areas upstream and
19 downstream.

20 A. Well, the Superfund process by this
21 point in time we were all aware was very onerous,
22 it was very study-driven, cost-intensive and very
23 slow and the outcome of the Superfund site
24 process was not certain. I think everybody
25 involved at that time felt that way and was

1 looking for a more efficient way to address the
2 issues both upstream and downstream of the site.

3 Generally, it would use less lawyer
4 time and more time with people on the ground and
5 more money going into projects on the ground
6 instead of negotiations and studies by opposing
7 expert consultants.

8 MR. STONE: Objection, Your Honor, I
9 move to strike to the extent the witness is
10 testifying about what everybody involved felt or
11 believed at the time. He lacks firsthand
12 knowledge to give such testimony.

13 MR. SILVERMAN: I can proceed to lay
14 additional foundation. I am also happy if that
15 statement stands as to what the mining companies
16 believed as parties to this process.

17 THE COURT: The Court understands it to
18 be just the opinion of the mining company.

19 MR. SILVERMAN: Your Honor, I would
20 like to move Defendants' Exhibit F, which are, to
21 my understanding, excerpts of the 1992 Record of
22 Decision in evidence.

23 MR. STONE: No objection, Your Honor.

24 MR. FRANSEN: No objection.

25 THE COURT: Defendants' Exhibit No. F

1 is admitted.

2 (Defendants' Exhibit F admitted.)

3 BY MR. SILVERMAN:

4 Q. Mr. Pfahl, you mentioned previously in
5 your testimony you were a member of a group
6 called the Silver Valley Trustees. Can you just
7 recount briefly what that group was doing at this
8 time?

9 A. In 1990 and '91 the Silver Valley
10 Trustees performed a comprehensive water sampling
11 upstream of the Superfund site. It had
12 identified sources of loading in the South Fork
13 of the Coeur d'Alene River during this time
14 period. The trustees were developing an action
15 plan and a list of potential projects that could
16 be undertaken that would address those various
17 sources of loading.

18 Q. And were the governments who were
19 parties to the negotiations over the consent
20 decree, namely the State and the Federal
21 government aware of the Silver Valley Trustees'
22 plans and actions?

23 A. The State was involved with the work of
24 the trustees and the Federal government, I
25 believe their representatives attended most of

1 the meetings, so they were well aware of what was
2 going on.

3 Q. Mr. Pfahl, I would like to direct your
4 attention now to a letter addressed to Ms. Dana
5 Rasmussen, which is in evidence as Defendants'
6 Exhibit G. Were you aware of this letter at the
7 time?

8 A. Yes.

9 Q. And were you aware of the positions
10 identified by Mr. Brown on behalf of Hecla and
11 the other mining companies as to what the
12 threshold issues were for entering consent decree
13 negotiations?

14 A. Yes.

15 Q. And what is your understanding as to
16 what the threshold position was of the mining
17 companies with respect to action outside the Box
18 involving CERCLA?

19 A. ASARCO's position and I believe Hecla's
20 also was that Coeur d'Alene Basin Restoration
21 Project would be recognized by the government as
22 the appropriate vehicle for addressing off-site
23 sources and impacts up and downstream from the
24 site.

25 Q. And at the time of this letter and

1 during the pendency of the negotiations, did
2 ASARCO have a role to play in the Coeur d'Alene
3 Basin Restoration Project?

4 A. Hecla Mining Company took the lead of
5 providing the technical assistance to that
6 project on behalf of the mining companies.
7 ASARCO had the lead with the Silver Valley
8 Trustees.

9 Q. And the Coeur d'Alene Basin Restoration
10 Project as it was set up, in your understanding,
11 did it have any functions, intended functions,
12 upstream of the Box?

13 A. My recollection on the Coeur d'Alene
14 Basin project is that it was more geared towards
15 the downstream issues. The trustees seemed to be
16 dealing with the upstream issues.

17 Q. Was ASARCO committed, in your
18 understanding, from a company standpoint in
19 seeing that the Coeur d'Alene Basin Restoration
20 Project was successful?

21 A. Yes, we felt it was very important that
22 the Coeur d'Alene Basin Restoration Project be
23 successful because it was the alternative to
24 expansion of the Superfund site.

25 Q. And in your understanding, was it an

1 alternative to expansion of the Superfund site
2 that incorporated the possibility of CERCLA
3 authorities being used upstream and downstream?

4 A. Yes. As I stated earlier, I think the
5 mining companies believed that use of certain
6 CERCLA authorities was probably necessary to make
7 it work. That would be the non-time-critical
8 process, in fact, the trustees had used for all
9 of their projects.

10 Q. And just very briefly, how has that
11 process worked as it has been implemented in the
12 Basin?

13 A. It seems to be quite efficient and
14 nononerous.

15 Q. In what way?

16 A. The basic premise of the process is you
17 would do an EECA, engineering evaluation cost
18 analysis. That EECA picks an appropriate cleanup
19 alternative. Generally the EPA in the case of
20 the trustees is issued action memorandums and
21 then selecting the appropriate cleanup
22 alternative and the parties sponsoring the
23 project have undertaken the work.

24 Q. Now, if I could direct your attention
25 forward to Defendants' Exhibit I, which is in

1 evidence. Are you there?

2 A. Yes.

3 Q. Are you acquainted with this letter
4 addressed to Art Brown, president and CEO of
5 Hecla; Augustus Kinsolving, vice president of
6 ASARCO and John Simko?

7 A. Yes.

8 Q. And were you aware at the time that it
9 was a letter in response to Defendants'
10 Exhibit G, which we were just discussing, the
11 September 22, 1992, letter from the mining
12 companies to Dana Rasmussen?

13 A. That is my understanding.

14 Q. And did the letter, in your
15 understanding, outline any assurance or
16 commitment on behalf of the EPA with respect to
17 what it would do with CERCLA outside the Box?

18 A. I think the letter answered all four of
19 the issues that were brought up in the letter
20 that had been sent to EPA, including the outside
21 of the Box issue.

22 Q. And if I could direct you to page 2 of
23 that letter, what was your understanding of the
24 commitment made by the EPA outside of the Box?

25 A. It was my understanding that EPA had

1 basically agreed to the concept of using the
2 Coeur d'Alene Basin project and the state natural
3 resource trustees as vehicles for addressing
4 issues outside of the Box. And they reiterated
5 their position that they had no intentions of
6 expanding the Superfund site.

7 Q. At this time, Mr. Pfahl, if you can
8 remember back to this time, did the mining
9 companies contemplate that this Coeur d'Alene
10 Basin Restoration Project would fail?

11 A. No, they did not.

12 Q. Did the parties have any reason to
13 believe that all interests at the table were not
14 equally committed to seeing that process succeed?

15 MR. STONE: Objection, Your Honor,
16 assumes facts not in evidence, assumes certain
17 parties were not committed to pursuing that
18 process.

19 THE COURT: Let me have that question
20 read back.

21 (Record ready by reporter.)

22 MR. SILVERMAN: Did the mining
23 companies...

24 THE COURT: Rephrase.

25 BY MR. SILVERMAN:

1 Q. Mr. Pfahl, did the mining companies
2 have any reason to believe, based upon the
3 representations of EPA or any other State
4 official, that all parties invested in this
5 process were not equally committed to seeing it
6 through and seeing it succeed?

7 A. Well, I think the mining companies'
8 position was that the public had been put on
9 notice through the ROD that the mining companies
10 were put on notice that this was the process that
11 was going to proceed based on the various
12 meetings and correspondence we had received. And
13 it was our understanding that the State was on
14 board with this process. As well as the Federal
15 government had been put on notice by sending
16 similar correspondence to congressmen.

17 Q. Was there any reason then, based upon
18 what ASARCO and the mining companies knew at the
19 time, to doubt that this process would not go
20 forward?

21 A. I think at the time we all felt that
22 everybody was on board and this was the direction
23 the project was going.

24 Q. And did the project, in fact, go in
25 that direction during the remaining pendency of

1 the negotiations over the consent decree?

2 A. Yes.

3 Q. Was there any retreat from a commitment
4 to the process, the cooperative process, outlined
5 as part of the Coeur d'Alene Basin Restoration
6 Project prior to signing the consent decree?

7 A. Not that I recall.

8 Q. Was there a retreat sometime after the
9 signing of the consent decree?

10 A. The Coeur d'Alene Basin Restoration
11 Project fell apart quickly after the government
12 filing the NRD lawsuit in 1996.

13 Q. And do you have an understanding as of
14 that time as to why the project fell apart?

15 A. The parties involved in the project
16 were all taking what appeared to be litigation
17 postures associated with the various lawsuits
18 that were on the table.

19 MR. SILVERMAN: Your Honor, I don't
20 know whether the Court wishes to recess now for
21 lunch.

22 THE COURT: We are going to recess, but
23 is there any reason everyone cannot be back at
24 1:00?

25 MR. NICKLES: That is fine.

1 (Luncheon recess.)

2 THE COURT: You may proceed.

3 MR. SILVERMAN: Thank you, Your Honor.

4 BY MR. SILVERMAN:

5 Q. Mr. Pfahl, before the lunch recess you
6 recall we were discussing the EPA's response to
7 the mining companies' proposals regarding
8 threshold issues to the consent decree
9 negotiations. Do you recall that?

10 A. Yes.

11 Q. Following the receipt of the
12 November 24, 1992, letter, which you discussed,
13 which is Defendants' Exhibit I, what happened
14 next with respect to negotiations?

15 A. In January 1993 the mining companies
16 and Gulf Resources submitted a good faith offer
17 to the U.S. EPA that outlined comprehensive
18 remediation of the entire Bunker Hill site.

19 Q. And how did Ms. Rasmussen's letter, the
20 November 24, 1992, letter, figure, if at all, in
21 that good faith offer?

22 A. It addressed many of the issues that
23 mining companies were looking for and gave the
24 impetus to the companies to enter into that good
25 faith offer.

1 Q. And just briefly, what were the
2 components of the good faith offer with respect
3 to work at, proposed work at the Bunker Hill
4 site?

5 A. Well, prior to submitting the good
6 faith offer, the mining companies and Gulf
7 Resources entered into a settlement agreement
8 that basically divided the workup within the
9 Superfund site. It was not divided up based on
10 liability, it was divided up based on being a
11 fair cost allocation between the two groups.

12 So the way to divide the site into two
13 discrete pieces was negotiated between all of the
14 PRPs and that was what was put forth in the good
15 faith offer. The good faith offer included
16 group 1, which was the mining companies and group
17 2, which was Gulf and the various other
18 industrial folks that were involved on the site.

19 The mining companies agreed to do, to
20 remediate the residential portions of the site,
21 excluding Pinehurst and Gulf Resources and the
22 other parties committed to performing the
23 remediation of the nonpopulated portions of the
24 site and Pinehurst.

25 Q. What was the logic to the exclusion of

1 Pinehurst, the residential area of Pinehurst
2 within the Box from the group 1 defendants,
3 ASARCO, Hecla and the others, obligations?

4 MR. STONE: Objection, relevance, Your
5 Honor. The witness has testified that the
6 agreement between Gulf and the mining companies
7 was based on rough cost allocation, it had
8 nothing to do with who was responsible for what
9 areas. I don't see the point of going into or
10 the relevance of going into why a particular area
11 was put on one person's side of the ledger versus
12 another side of the ledger.

13 MR. SILVERMAN: Your Honor, it is
14 directly relevant because Pinehurst was
15 eventually placed, because of subsequent events,
16 on to the side of the ledger of ASARCO, Hecla and
17 the others despite the fact that they had no
18 historical operations impinging on that area. So
19 it is part of the story for how the consent
20 decree came to be, what the companies'
21 obligations were. But more importantly, as
22 Ms. Temkin spoke to in her opening statement,
23 this is the basis in part on which we propose a
24 remedy by this Court.

25 So it is important to trace through how

1 the companies came to be obligated to do
2 Pinehurst and how the EPA's commitments figured
3 in assuming that obligation, which we now ask the
4 Court to remedy by taking the Pinehurst money and
5 making the EPA responsible, in effect, for what
6 the actual costs have been.

7 THE COURT: Overruled.

8 BY MR. SILVERMAN:

9 Q. Mr. Pfahl, do you recall the question
10 that was pending?

11 A. Could you repeat the question, please?

12 Q. I believe the question went to what was
13 the logic of excluding Pinehurst as a residential
14 area from the mining companies' obligations?

15 A. The mining companies had been very
16 adamant with Gulf about who was responsible for
17 Pinehurst all along. Our studies we had
18 conducted in the various towns determined what
19 percentage of lead and soils came from smelter
20 versus came from mining operations. And that
21 study showed that there was very little mining
22 impacts within Pinehurst. And furthermore, those
23 mining impacts that may have been there were due
24 to operations by others located up Pine Creek.

25 Pinehurst is not in the floodplain of

1 the South Fork of the Coeur d'Alene River, it is
2 in the floodplain of Pine Creek. And whatever
3 tailings came to be located in that town would
4 have come from operations for which the mining
5 companies had no responsibility.

6 Q. Pointing to the map that is put up on
7 the board before you, which I believe is
8 Plaintiffs' Exhibit 10; is that right?

9 MR. BRIGHTON: Yes.

10 BY MR. SILVERMAN:

11 Q. Do you recognize this map designated as
12 Plaintiffs' Exhibit 10?

13 A. Yes.

14 Q. Will it assist you in recounting for
15 the Court what your testimony is with respect to
16 the residential area of Pinehurst within the Box?

17 A. Yes.

18 Q. Can you please point out for the Court
19 what you are saying when you say that Pinehurst
20 is out of the floodplain of the South Fork?

21 A. Do you want me to approach the map?

22 THE COURT: Go ahead and step down so
23 you can point it out. If counsel needs to see,
24 you can come back around.

25 MR. SILVERMAN: Either that, or I have

1 a smaller version we can put on the Elmo.

2 THE WITNESS: The South Fork of the
3 Coeur d'Alene River flows through this valley I
4 am indicating here. So any tailings from
5 upstream mining operations of ASARCO and Hecla
6 would have moved down this basic corridor
7 following the South Fork of the Coeur d'Alene
8 River. Pinehurst is on Pine Creek drainage.
9 This is basically Pine Creek flowing around and
10 into the South Fork at that location.

11 So tailings that came to be located in
12 Pinehurst originated from mining operations that
13 were upstream for which ASARCO and Hecla had no
14 history of operation.

15 BY MR. SILVERMAN:

16 Q. Mr. Pfahl, subsequent to submission of
17 the good faith offer containing the proposal that
18 you have outlined allocating the various areas of
19 the boxes between the mining companies and Gulf,
20 did anything happen to change that proposal?

21 A. I don't recall the exact date, but
22 sometime soon after submitting the good faith
23 offer and beginning negotiations Gulf Resources
24 and Pintlar went bankrupt.

25 Q. And how, if at all, did that change the

1 ongoing negotiations of the consent decree and
2 the companies' obligations with respect to the
3 site?

4 A. The mining companies wanted to go
5 forward with the agreement under the basis that
6 we had put forth in the good faith offer. And
7 ultimately the government agreed to go forward
8 negotiating a deal with just the mining companies
9 that had several liability whereas mining
10 companies would only be liable for the work they
11 had agreed to do.

12 As part of that, the government was
13 fairly adamant of having the entire residential
14 portion of the site dealt with so Pinehurst was
15 added into the responsibilities of the mining
16 companies.

17 Q. Now, you have just finished explaining
18 that ASARCO and Hecla had no historical
19 operations upstream of the town of Pinehurst on
20 Pine Creek. So can you explain from the
21 companies' standpoint why were the companies
22 willing to assume additional obligations with
23 respect to this residential area?

24 A. Well, we felt like we were getting a
25 package deal that addressed the Superfund site.

1 We had some assurances from EPA about activities
2 that would occur outside of the site and how that
3 would be handled. And I think overall the
4 companies felt it was worth the additional
5 financial burden of taking on that portion of the
6 site in order to preserve the deal.

7 Q. And did the companies at that time have
8 some estimates as to what the additional
9 financial burdens would be of taking on
10 Pinehurst?

11 A. We had no hard estimates for Pinehurst,
12 but we didn't feel that it was going to be that
13 big of a deal.

14 Q. Financially why was it significant to
15 have negotiated with Gulf from the companies'
16 standpoint over how to allocate Pinehurst?

17 A. When the companies negotiated with
18 Gulf, we looked at all the various components of
19 the site, including Smelterville Flats, central
20 impoundment areas, smelter site, residential
21 yards. And based on that, the companies made a
22 deal that seemed financially right at the time.

23 Q. And when the EPA came and as you put
24 it, adamantly insisted on adding Pinehurst, was
25 it your understanding that that then -- was it

1 your understanding that the companies agreed
2 because -- strike that.

3 Let me ask you to turn to Defendants'
4 Exhibit M. Are you familiar with this exhibit,
5 Mr. Pfahl?

6 A. Yes.

7 Q. What is this exhibit?

8 A. I believe this is a copy of the 1994
9 consent decree.

10 Q. And is this the consent decree which
11 incorporated the companies' obligations with
12 respect to Pinehurst?

13 A. Yes.

14 Q. And if I could ask you to turn to page
15 15 of the consent decree and let me put it up on
16 the Elmo. I want to direct your attention to
17 paragraph W. Do you follow where I am,
18 Mr. Pfahl, line 23 on this page?

19 A. Yes.

20 Q. What was your understanding, Mr. Pfahl,
21 with respect to the status of the 1992 ROD which
22 you discussed earlier in your testimony as it
23 relates to the consent decree?

24 A. Well, the RODs were not attached
25 wholly, but well, in fact, they were attached as

1 Attachment A and they were incorporated by
2 reference. So I think to us that meant whatever
3 was in the RODs became a portion of the consent
4 decree.

5 Q. And in terms of the 1992 ROD which you
6 discussed earlier, what did that mean to the
7 mining companies?

8 A. The '92 ROD included the language
9 stating that the out-of-the-Box activities would
10 be conducted in a multimedia approach, not
11 utilizing -- it was our opinion that that meant
12 they weren't going to expand or the government
13 would not expand the Superfund site to list a new
14 site.

15 Q. Did you have reason to -- what reason
16 did you have to form that opinion as you have
17 discussed earlier this morning with respect to
18 what CERCLA, how CERCLA would be used outside the
19 Box?

20 A. The companies had received all the
21 correspondence we have discussed, as well as the
22 government had, EPA had issued that
23 correspondence to Congress and put it in the ROD.
24 So the public was on notice that the
25 out-of-the-Box remedy was going to be handled

1 under a different approach.

2 Q. Now, you refer to this as a total
3 package. And when you refer to it as a total
4 package, what do you mean?

5 A. As you can see from the record from
6 what the mining companies had been asking for,
7 certain assurances before they entered into an
8 agreement. I believe the companies got most of
9 them, those assurances, and believed that they
10 were incorporated into the overall deal. And,
11 therefore, the companies went forward and entered
12 into the agreement.

13 Q. And in seeking to obtain those
14 assurances, which as you have testified the
15 companies did receive, what is your understanding
16 of what the companies were hoping to achieve
17 through this total package?

18 A. The companies were looking for
19 certainty and some kind of finality to this
20 process. They did not want to get drug into a
21 Basin-wide Superfund process that would go on and
22 on and on into infinity. They were looking for a
23 process that could be managed and which the
24 companies had some form of control over their
25 destiny. And at the time this consent decree was

1 signed, I believe the companies felt they were
2 getting that.

3 Q. Following the signing of the consent
4 decree, did the companies continue to enjoy the
5 benefits of that certainty that they felt was
6 provided by the total package?

7 A. At least for a couple years.

8 Q. And when did they cease to continue to
9 enjoy the certainty, which as you have described,
10 was bargained for?

11 A. I believe we didn't see any change in
12 the government's position until I believe it was
13 the document that counsel showed this morning,
14 the second amended complaint on this NRD lawsuit
15 when the government put us on notice that their
16 position had changed. And actually, it probably
17 would have been a little before that. The press
18 release stating that the EPA was doing an RI/FS
19 Basin-wide, 1997, '98 time frame.

20 Q. And if you can describe and
21 characterize for the Court, what was the impact
22 of that decision on ASARCO?

23 A. It got rid of that kind of certainty
24 the company had as far as how issues in the Coeur
25 d'Alene Basin were going to be dealt with and

1 overall had a negative financial impact on the
2 company, impacted its stock price at that time
3 and ultimately its ability to -- impacted its
4 ability to borrow money and sell its securities.

5 MR. STONE: Your Honor, we would move
6 to strike and we state a continuing objection on
7 the relevance on the same ground that
8 Mr. Brighton did for Mr. Brown's testimony that
9 generalized impacts on the companies we don't
10 believe are what is relevant here. Just note the
11 objection.

12 MR. FRANSEN: The State will join in
13 that objection.

14 THE COURT: Objection noted and
15 overruled.

16 BY MR. SILVERMAN:

17 Q. Mr. Pfahl, can you proceed to explain
18 what repercussions were there for the company in
19 the EPA's decision to commence a Basin-wide RI/FS
20 and remove the certainty that had been bargained
21 for?

22 A. In hindsight one can probably say that
23 it had enough impact that it ultimately led to
24 the company no longer being a public company and
25 basically an unfriendly takeover had occurred.

1 Q. And by that you are referring to what
2 events in ASARCO's corporate history?

3 A. Soon after this happened, the
4 companies' financial condition deteriorated to
5 where they were looking at merging with another
6 company called Cyprus. That deal got scuttled by
7 Phelps Dodge and ultimately Grupo Mexico bought
8 the stock of ASARCO and is our current owner.

9 Q. Now, Mr. Pfahl, you testified earlier
10 this morning you are familiar both with the work
11 that has been done under the consent decree and
12 what the costs have been historically; is that
13 right?

14 A. That is correct.

15 Q. And can you just proceed to describe
16 what work has been done since the signing of the
17 consent decree?

18 A. The signatories to the consent decree
19 have lived up to their part of the deal and
20 performed all the work that we agreed to perform
21 on an annual basis. Since signing the consent
22 decree, I believe somewhere on the order of 1,800
23 residential properties have been remediated.

24 The entire town of Smelterville has
25 been remediated and certified. Kellogg north of

1 I-90 has been remediated and is in the process of
2 being certified. The residential portion of
3 Pinehurst will be done entirely this year. And
4 through the high-risk portion of the program,
5 numerous residential properties have been
6 addressed in the outlying towns of Page, Wardner,
7 Elizabeth Park and Montgomery Gulch.

8 Q. And what remains to be done, Mr. Pfahl,
9 under the consent decree in terms of geographic
10 areas that remain to be addressed?

11 A. After the completion of this season
12 there will be some commercial property and
13 rights-of-way remaining to be remediated in
14 Pinehurst. Kellogg south of I-90 is only
15 partially complete. Wardner will be completed
16 and the outlying towns I have just mentioned,
17 Page, Elizabeth Park and Montgomery Gulch.

18 Q. And Mr. Pfahl, in preparation for this
19 hearing, did you take a look at your accounting
20 records with respect to what the actual costs
21 have been in performing this work that you have
22 described and what the future estimated costs
23 are?

24 MR. STONE: Your Honor, we would
25 object. We don't see that the costs are

1 relevant. We did not understand that the costs
2 associated with performing was within the scope
3 of what this proceeding was going to be about.
4 We don't think it was within the scope of the
5 order that Your Honor issued defining the matters
6 to be addressed.

7 MR. SILVERMAN: Your Honor, if I might
8 briefly address that. This proceeding, part of
9 it is to address the remedy that the companies
10 are seeking. The remedy the companies are
11 seeking as Ms. Temkin described rests in part on
12 having to allocate costs under the consent
13 decree. We are asking the Court to take a look
14 at what actual costs have been assumed with
15 respect to Pinehurst and what costs are
16 anticipated in the future related to Pinehurst
17 and allocate those to the United States as a way
18 of achieving rough justice in the outcome that we
19 are requesting in terms of modification. So --

20 MR. STONE: Your Honor, in the
21 transcript of the prior proceedings Your Honor
22 said, "The sole issue in my judgment is the issue
23 of consideration." And if I remember my law
24 school teaching and the Peppercorn theory of
25 consideration, what is important in consideration

1 is not how much, but whether there is something
2 there.

3 And for that reason we don't think the
4 amount of expenditures here are within the ambit
5 of what we have been asked to address. We
6 haven't had discovery or disclosures on what
7 underlies any cost estimates that Mr. Pfahl might
8 talk about.

9 MR. SILVERMAN: Your Honor, I believe
10 the Court's order subsequently set forth the
11 issues to be addressed in this hearing. And as
12 Mr. Nickles pointed out this morning, one of
13 those issues is what power you have to fashion a
14 remedy under Rule 60(b). This directly relates
15 to your power to fashion a remedy.

16 I would refer Your Honor to the Leavitt
17 case arising in the Tenth Circuit which
18 specifically says that Federal courts have the
19 power notwithstanding unambiguous provisions of
20 consent decrees to reform them in the manner that
21 does justice in terms of changed circumstances.
22 This is what that relates to.

23 We are just asking to make our record
24 in that regard and the Court can resolve the
25 issues with respect to the commitment. And as if

1 we hope, the Court sides with our position and
2 sees that there was a commitment that was undone
3 unfairly and inequitably by the EPA, then the
4 Court is going to be a position to fashion a
5 remedy. We are trying to put on the table how we
6 think the Court should fashion the remedy in a
7 way that makes sense logically.

8 THE COURT: Does the State wish to be
9 heard?

10 MR. FRANSEN: The State would join the
11 objection of counsel for the United States and we
12 would agree this is beyond the scope of this
13 particular hearing. The State had no idea and
14 could have no idea what remedy or that this
15 remedy was being requested from a court prior to
16 opening statements today.

17 Moreover, the State has no ability or
18 has had no ability in the past to be privy to
19 these kinds of numbers. This is completely new
20 information to the State. These numbers have not
21 been shared with the State or the Federal
22 government, to my knowledge, in the past.

23 As I understand the last trial,
24 depositions never covered this information
25 either. I think it is completely beyond the

1 scope of this hearing.

2 MR. NICKLES: Your Honor, could I just
3 speak to this issue for a moment?

4 THE COURT: You are going to have to do
5 it through counsel.

6 MR. SILVERMAN: Your Honor, the issue
7 as we see it is excluding Pinehurst from the
8 bargain the company struck. The reason that
9 makes sense as a remedy is because companies
10 never would have assumed that obligation. As
11 Mr. Pfahl has testified, it related to a zone
12 where they had no historic operations were they
13 not invested in the total package. Part of that
14 total package was the commitment not to use
15 CERCLA outside the Box. So this directly relates
16 to your remedy as I have mentioned.

17 I can make an offer of proof on this,
18 but we do have a witness here who has substantive
19 knowledge about the actual costs. I believe we
20 have laid the foundation for his testimony. The
21 State is free and the government is free to audit
22 these costs, if they must. They always have
23 access to this information. It is part of funds
24 paid out for work that they have ordered the
25 companies to do.

1 THE COURT: Counsel, before you finish
2 here, I just want to ask the witness, did you say
3 the work in Pinehurst had not been done?

4 THE WITNESS: The work in Pinehurst
5 will be complete this year with the exception of
6 a small amount of commercial property which we
7 know exactly what is left at Pinehurst because
8 all the sampling has been completed.

9 THE COURT: How would the Court be able
10 to fashion a remedy then if the work has been
11 done, just shifting of the costs?

12 MR. SILVERMAN: Exactly, Your Honor.
13 The Court would fashion a remedy by taking the
14 actual costs through the end of the calendar
15 construction season 2001, which his record shows
16 to be \$14.4 million and require for the next
17 \$14.4 million of work under the consent decree
18 that the EPA and the State pay those moneys.

19 MR. STONE: Your Honor, again, opening
20 statements today were the first time that anyone
21 here on the government's side, either United
22 States or the State, had ever heard that what
23 this hearing was about was whether costs
24 associated with the Pinehurst project should be
25 shifted to the United States and to the State of

1 Idaho. I just don't know how we can proceed down
2 this road hearing that for the first time today.

3 THE COURT: State of Idaho.

4 MR. FRANSEN: Your Honor, at the last
5 hearing before this Court we understood the
6 remedy being requested by plaintiffs was on the
7 part of Hecla no further work on the consent
8 decree until the issuance of the RI/FS for the
9 Basin areas. And by ASARCO I believe the
10 requested remedy was a simple vacating the
11 consent decree. I may have misstated that,
12 counsel can speak to that.

13 Today we find out that what is
14 equitable is to shift from the defendants, their
15 obligations, shift those obligations to the
16 plaintiffs in this case. Somehow make the
17 plaintiffs liable and responsible for work that
18 the defendants agreed to do. We had no notice of
19 that. It is very difficult for us to argue the
20 equities of such proposal when we don't know
21 about the proposal.

22 Second, contrary to what counsel
23 represents, we have not had access to these
24 numbers and we do not have access to these
25 numbers.

1 THE COURT: Well, of course the Court
2 is not committing itself and I am making no
3 representations as to what the Court may do, but
4 I think you construed the Court's opinion too
5 narrowly because the second area that was of
6 concern to the Court was whether or not the Court
7 had the jurisdiction, the equitable powers, to
8 fashion a remedy under 60(b)(5) I believe it was,
9 if the Court felt that it was necessary or just,
10 language of the statute. That should put parties
11 on notice that the Court has broad discretion and
12 can fashion any remedy that it feels is just if
13 the facts warrant the same.

14 Now it may be true that the State of
15 Idaho and the Federal government have learned for
16 the first time today exactly what defense was
17 suggesting and it may be in fairness if the Court
18 went that direction that costs be audited to make
19 sure that they are fair. But I am going to go
20 ahead. This is a court matter. I am going to
21 allow the witness to testify so we can move this
22 matter along and hopefully get it finished today.

23 MR. SILVERMAN: Thank you, Your Honor.
24 We will do our best to move it along promptly.

25 MR. SILVERMAN: Let me put on the

1 screen an exhibit we had drawn as an
2 illustrative. And I believe for the record's
3 sake let's go ahead and call this Defendants'
4 Exhibit S. I believe would be next in order if
5 you want to mark this.

6 BY MR. SILVERMAN:

7 Q. Mr. Pfahl, how did you proceed and how
8 do you maintain records which allow you to
9 represent what actual costs have been through the
10 end of 2000 and what anticipated costs are?

11 A. As I stated earlier, I am the treasurer
12 for the Upstream Mining Group and I paid all the
13 bills actually since prior to signing the consent
14 decree. Beginning in 1994, the Upstream Mining
15 Group began doing this remediation work. Those
16 records are maintained in a computer in my
17 office.

18 We use software called QuickBooks Pro
19 and it is a fairly simple accounting system. So
20 I am able to through our records and determine
21 what moneys were spent each year. Our project
22 manager then keeps more detailed records as to
23 where various expenditures were made so we know
24 exactly how much was spent in each town on each
25 property to perform the actual mediation.

1 What I did in this exhibit is simply
2 summarize totals from each year. These totals
3 include our cost of managing the project, as well
4 as sampling and analysis and engineering and
5 everything involved that the Upstream Mining
6 Group pays for.

7 Q. Then if you could go ahead, have you
8 summarized for us what the actual costs have been
9 in total through the end of 2000?

10 A. Yes. There is a dark vertical line on
11 the copy that is on the monitors. That would
12 show the end of 2000. Those were actual costs
13 at that point. The 2001 costs are very close
14 estimates because we know exactly how many yards
15 we are doing this year and we have an exact list
16 of commercial properties and we know how many
17 square feet they are. Our contract with our
18 contractor basically is a unit price contract
19 that pays for things by the square foot.

20 For 2000, 3 and 4, those numbers are
21 based on estimates for the total cost. The
22 Pinehurst cost again is well defined because all
23 Pinehurst has been sampled and we know just what
24 areas need remediation at this point.

25 The bottom line is actual cost for 2000

1 for the entire project is on the order of \$33.3
2 million and Pinehurst was at \$8.9 million of
3 that. The remaining estimated costs for the
4 project are an additional \$24 million to complete
5 the entire project. And that would be all of our
6 obligations under the consent decree with the
7 exception of the long-term funding of the
8 institutional controls program for which we don't
9 know what that number is at this point.

10 There is an additional \$5.5 million to
11 be spent at Pinehurst. Most of that work is in
12 progress as we speak and will be completed this
13 year.

14 Giving a total estimated cost for
15 compliance with the consent decree, again
16 excluding the final payment for long-term funding
17 of the Institutional Controls Program of
18 \$57.4 million, which Pinehurst was \$14.4 million
19 of that.

20 Q. You speak of the long-term funding of
21 something called the Institutional Controls
22 Program. What is that?

23 A. The Institutional Controls Program is
24 managed by Panhandle Health District and it is
25 designed to protect the caps that are installed.

1 It is basically a program driven by the building
2 codes. If an individual within the Superfund
3 site obtains a building permit and is going to
4 perform excavations, they have to deal with the
5 Institutional Controls Program which then
6 regulates how dirt is managed, particularly dirty
7 dirt, dirt that might be contaminated with lead,
8 how it is to be managed. And it is designed to
9 keep the caps that have been installed on many of
10 these residential properties from being
11 recontaminated in the long-term.

12 Q. And what is precisely the long-term
13 funding mechanism for this institutional controls
14 program you have mentioned?

15 A. Under the consent decree the mining
16 companies agreed to provide long-term funding of
17 the program. That funding was to be provided
18 upon final certification of completion of the
19 remedial actions within the Superfund site under
20 the consent decree.

21 That long-term funding was going to be
22 based on actual costs incurred and managing the
23 program through the life of the consent decree.
24 And I am assuming that we would use formulas
25 similar to what would have been used at other

1 sites for other long-term funding, which would
2 have a discount rate and assume you are going to
3 fund it for 30 years at some discount rate.

4 Q. And what have the average historical
5 costs been for this program through 2000 on
6 average?

7 A. The mining companies put up the funding
8 or Upstream Mining Group puts up the funding for
9 the residential portion of the institutional
10 controls program and has since 1994. It has been
11 averaging \$130,000 per year.

12 Q. Has a portion of that \$130,000 per year
13 related to institutional control activities with
14 respect to Pinehurst?

15 A. Yes.

16 Q. And what portion of that \$130,000
17 reflects those activities at Pinehurst?

18 A. Well, the only way to allocate costs of
19 the institutional controls program would be to
20 look at the total amount of work done in each
21 area. That would be representative of the amount
22 of regulation in the future that that area would
23 be subject to.

24 You cannot just look at residential
25 yards because the Institutional Controls Program

1 also regulates commercial properties and
2 rights-of-ways and all the other aspects of the
3 consent decree. So really the only reasonable
4 way to look at it would be to look at dollars
5 spent in each area doing the remediation and that
6 would be indicative of future costs for the
7 Institutional Controls Program for regulating
8 those areas.

9 Under that theory, approximately
10 25 percent of the funding has been -- or costs
11 for this project have been associated with
12 Pinehurst. So it is reasonable to assume that
13 25 percent of the long-term costs of the
14 residential portion of the institutional controls
15 program would also be allocable to Pinehurst.

16 Q. In your understanding of the
17 negotiations, Mr. Pfahl, would ASARCO have ever
18 entered a consent decree containing obligations
19 with respect to Pinehurst where it had no
20 historical operations were it not for the EPA's
21 commitment?

22 MR. STONE: I object. I don't think
23 there is foundation for that.

24 THE COURT: Sustained.

25 MR. SILVERMAN: Your Honor, may I

1 proceed with foundation?

2 THE COURT: No, I don't think the
3 witness is in a position to give that conclusion.

4 MR. SILVERMAN: Mr. Pfahl, thank you.

5 THE COURT: Any questions by Hecla?

6 DIRECT EXAMINATION

7 QUESTIONS BY MR. WIELGA:

8 Q. Good afternoon, Mr. Pfahl.

9 A. Good afternoon.

10 Q. While we still have the cost exhibit
11 up, I have a question for you. Is it your
12 understanding under the consent decree there is
13 the possibility for a five-year review?

14 A. Yes, we have already gone through one
15 five-year review and I would assume we will do
16 another one that will be coming up in
17 approximately three years.

18 Q. Just briefly, what is that five-year
19 review?

20 A. The purpose of the five-year review is
21 to review the remedy and to look at how effective
22 it has been and some of the things that were
23 looked at were potential recontamination, blood
24 lead data was looked at five years ago.

25 Q. Looking at your cost estimates in the

1 future, do they take into account the possibility
2 of maybe changes in the consent decree at the
3 next five-year review?

4 A. No, they do not. They are based on the
5 situation we have in place today.

6 Q. Finally, the Coeur d'Alene Basin
7 Restoration Project, do you recall your testimony
8 on that?

9 A. Yes.

10 Q. Was that in any way explicitly going to
11 cover human health issues?

12 A. The framework for the Coeur d'Alene
13 Basin Restoration Project clearly lays out human
14 health issues as one of the aspects that were to
15 be covered by the project.

16 MR. WIELGA: Thank you. No more
17 questions.

18 THE COURT: Cross?

19 CROSS-EXAMINATION

20 QUESTIONS BY MR. STONE:

21 Q. Mr. Pfahl, I introduced myself at one
22 of the breaks, I am Randy Stone from the Justice
23 Department. I wanted to try and cut right to the
24 chase.

25 I think you said that what you thought,

1 what ASARCO thought it was getting here was a
2 package deal, right?

3 A. That is correct.

4 Q. And if I understood you correctly, that
5 package deal included a consent decree that dealt
6 with stuff inside the Box?

7 A. That is correct.

8 Q. And it dealt with other what you called
9 assurances outside the Box, right?

10 A. That is correct.

11 Q. And ASARCO negotiated the best deal it
12 could get, didn't it?

13 A. I believe so.

14 Q. And you said that what ASARCO thought
15 it was getting in this package deal was
16 certainty, right?

17 A. That is correct.

18 Q. But there was a fair amount of
19 uncertainty when you signed the consent decree,
20 wasn't there?

21 A. There was a pending NRD suit that had
22 been filed by the Coeur d'Alene Tribe.

23 Q. And you didn't know exactly what the
24 cost of the work required by the consent decree
25 would be, did you?

1 A. We had an estimate at the time.

2 Q. But you agreed to do the work even if
3 the estimates were wrong, didn't you?

4 A. That is correct.

5 Q. And I think you testified before that
6 particularly with respect to Pinehurst, you
7 didn't know how much that part of the project was
8 going to cost, did you?

9 A. We had an estimate at the time, but it
10 was a very rough estimate because really no work
11 had been done in Pinehurst to determine the scope
12 of that, potentially the scope of that
13 remediation.

14 Q. And then stepping away from the consent
15 decree and talking about the Basin project, you
16 didn't know how much the Basin project would cost
17 ASARCO, did you?

18 A. No.

19 Q. Let me have you turn your attention to
20 what has been put into evidence as Defendants'
21 Exhibit I. This is the November 24, 1992, letter
22 from EPA administrator Dana Rasmussen to ASARCO,
23 Hecla and Sunshine. Do you have that?

24 A. Yes.

25 Q. And did you testify that you understood

1 this letter as setting forth EPA's commitment it
2 would not use remedial authority outside the Box?

3 A. I think I stated it was this letter and
4 a number of other correspondence and publications
5 that EPA had made in this time period, including
6 the Record of Decision, letter to Larry LaRocco
7 and this particular letter.

8 Q. And I think we will probably take those
9 one at a time. Why don't we start with this one.
10 What language in this letter is it that you
11 interpreted as a commitment by EPA not to use
12 remedial authority outside the Box? And I would
13 like you to show me the particular words or
14 phrases that you construed as a commitment.

15 A. "As you are aware, neither of these
16 RODs addresses contamination in the remainder of
17 the Basin, including the South Fork of the Coeur
18 d'Alene River. EPA intends to use a variety of
19 authorities to address contamination in these
20 areas."

21 Q. Let's take those sentences one at a
22 time. The first sentence describes what the
23 Record of Decision covered, right?

24 A. That is correct.

25 Q. And the Record of Decision did only

1 cover the 21-square-mile area known as the Box,
2 right?

3 A. I believe the nonpopulated areas Record
4 of Decision laid out a framework or a process
5 that was going to be used outside the Box.

6 Q. Then we will take that one up when we
7 look at that language. Let's move on to the next
8 sentence. It says, "EPA intends to use a variety
9 of authorities to address contamination in these
10 areas." You have construed that statement of
11 intention as a commitment by the agency?

12 A. Yes.

13 Q. Is there anything else in this letter,
14 particular language that you saw as a commitment
15 by the EPA?

16 A. I think under No. 4 where the Coeur
17 d'Alene Basin project is covered, it is stated
18 that the Coeur d'Alene Basin project would
19 proceed separately and that Hecla Mining Company,
20 essentially the mining companies were going to
21 have representation on the steering committee.

22 Q. Let me take those one at a time. It
23 says that the Coeur d'Alene Basin project and
24 consent decree negotiations would proceed
25 separately. Do you construe that as a commitment

1 that EPA would not use remedial authority outside
2 the Box?

3 A. I think, again, we looked at the whole
4 gamut of correspondence and --

5 Q. I am just asking about this letter
6 right now and this sentence that you identified.
7 Do you view that sentence as language of
8 commitment by EPA not to use remedial authority
9 outside the Box?

10 A. I think that we would construe that to
11 be a commitment not to use the Coeur d'Alene
12 Basin project outside the Box.

13 Q. Then let's go to the next sentence that
14 you identified. You characterize that as a
15 commitment that Hecla Mining Company would be
16 made a member of the steering committee. That is
17 not what it says, is it? Doesn't it say they
18 would be invited to a steering committee meeting?

19 MR. SILVERMAN: Your Honor, I am going
20 to object, that is compound and argumentative.

21 THE COURT: It is cross-examination.
22 Overruled.

23 THE WITNESS: The next statement says,
24 "Such mining interests are also represented on
25 the management advisory committee." So again,

1 the mining companies had a position in the
2 management of the Coeur d'Alene Basin project.

3 BY MR. STONE:

4 Q. So they were members of the management
5 advisory committee. But this was not -- is that
6 correct, the mining companies were members of the
7 management advisory committee?

8 A. I think this letter is just stating
9 facts at the time.

10 Q. But let's go back to the prior
11 sentence. Have you changed your mind? Is there
12 a promise here that the mining companies would
13 become members of the steering committee?

14 A. No, I misconstrued that. It states in
15 order to begin this coordination the steering
16 committee has invited a mining representative
17 from Hecla Mining Company to the next steering
18 committee meeting. Hecla was already a member of
19 the management advisory committee.

20 Q. Are there any other statements in this
21 letter that you understood as language of
22 commitment by EPA?

23 A. I don't see any others.

24 Q. Let me ask you to turn your attention
25 to Defendants' Exhibit A. This is the letter to

1 Mr. LaRocco that you testified you had seen and
2 it was the second thing that you identified as
3 evidence of an EPA commitment not to use EPA
4 remedial authority outside the Box.

5 A. What exhibit was that?

6 Q. Exhibit A, first Defendants' exhibit.
7 I am sorry, maybe I didn't ask you, what language
8 in this letter do you view as language of
9 commitment by EPA not to use remedial authority
10 outside the Box?

11 A. "In that letter you express concern
12 that the Environmental Protection Agency
13 involvement in area-wide restoration efforts with
14 the Coeur d'Alene Basin might lead to an
15 expansion of the Bunker Hill Superfund site. Let
16 me state unequivocally that it is not EPA's
17 intention to expand the boundaries of the site."

18 Q. And that sentence also refers to EPA's
19 intention. Is it your testimony that you
20 understood that statement of EPA's intention as a
21 commitment?

22 A. From a businessperson's point of view,
23 yeah, I would take that as a commitment.

24 Q. Okay. Then I think the third source
25 that you referred us to was the Record of

1 Decision and that is Defendants' Exhibit F and in
2 your direct testimony you focused particularly on
3 the text on page 4-2. As I have done with the
4 other documents, I would ask you to let me know
5 what it is on that page that you understood as a
6 commitment by EPA not to use remedial authority
7 outside the Box.

8 A. "The NCP gives U.S. EPA broad
9 discretion to use not only CERCLA, but also other
10 appropriate authorities to address releases of
11 hazardous substances in the Coeur d'Alene Basin.
12 Recently U.S. EPA, State of Idaho, Coeur d'Alene
13 Tribe of Idaho and other Federal, State and local
14 agencies have initiated efforts to integrate
15 water quality improvement programs in the Coeur
16 d'Alene Basin. The Coeur d'Alene Basin
17 Restoration Project efforts are expected to
18 complement actions selected in this ROD improving
19 overall water quality in the Basin."

20 Q. Let's look at the first paragraph,
21 excuse me, the first sentence you read. That
22 sentence describes the discretion that EPA has
23 under the NCP, which is the National Contingency
24 Plan; doesn't it?

25 A. That is correct.

1 Q. It describes EPA's discretion to use
2 not only Superfund, but also other statutes,
3 correct?

4 A. That is correct.

5 Q. And you construed that as a commitment
6 that EPA would not use Superfund remedial
7 authority outside the Box?

8 A. I think again you would have to look at
9 all of these documents in the broad sense of what
10 was going on at the time. These all came out
11 about the same time and were all pointing towards
12 use of the Coeur d'Alene Basin Restoration
13 Project to deal with the -- to deal with issues
14 outside the 21 square miles.

15 Q. Okay. I think in looking at the Record
16 of Decision Mr. Silverman asked you whether the
17 Record of Decision said anything about
18 identifying other Superfund sites in the Basin.
19 Do you remember being asked that question? I
20 think your answer was no, you didn't remember.
21 You did not believe that the ROD talked about
22 listing other Superfund sites. Do you remember
23 that testimony?

24 A. Yes.

25 Q. Did the RODs say that EPA would not

1 list other Superfund sites or did it expressly
2 say that EPA would not expand the boundaries of
3 the 21-square-mile area?

4 A. It doesn't say that in those very
5 words.

6 Q. I think you described the Basin
7 Restoration Project as an alternative to the use
8 of Superfund remedial authority. Do you remember
9 that?

10 A. Yes.

11 Q. Do you think that the Basin project and
12 Superfund remedial authority were mutually
13 exclusive alternatives? Is that what you thought
14 at the time?

15 A. Yes. I would still think that.

16 Q. Let me turn your attention to page A-2
17 of the Record of Decision, which is the second
18 portion of this document that you focused on in
19 your direct testimony. Could you read the last
20 sentence under subheading C for us?

21 A. The one that starts with, "The Coeur
22 d'Alene Tribe"?

23 Q. The last sentence of that paragraph
24 that begins with, "Further."

25 A. "Further, other remedial activities

1 both upstream and downstream of the site are not
2 within the scope of this ROD and will be
3 addressed under the Coeur d'Alene Basin
4 Restoration Project."

5 Q. Doesn't that say that the Coeur d'Alene
6 Basin Restoration Project might involve other
7 remedial activities?

8 A. Yes, I think the companies always
9 realized that something is going to be done both
10 upstream and downstream. It was just a matter
11 under what process it was going to be done.

12 Q. Remedial action, as you well know, is a
13 term of art, isn't it, under Superfund?

14 A. I suppose in a pure legal sense, yes.

15 Q. And it means remedial action is cleanup
16 activities at a national priority listed
17 Superfund site; isn't it?

18 A. This was a public document, not
19 necessarily put out to be interpreted by
20 attorneys. To me it means they were going to do
21 other activities both upstream and downstream.

22 Q. So you didn't interpret the word
23 "remedial activities" as having anything to do
24 with Superfund work outside the Box?

25 A. No. Remediation to me means cleanup.

1 So under my definition, other cleanup activities
2 both upstream and downstream of the site would be
3 undertaken by the Coeur d'Alene Basin Restoration
4 Project.

5 Q. Now, I think in your questions and the
6 questions Mr. Silverman posed you said that --
7 let's have you turn again to the Defendants'
8 Exhibit I. This is again the November 24, 1992,
9 letter. Are you there?

10 A. Yes.

11 Q. Do you recall testifying that you saw
12 no retreat by EPA from the commitment made here
13 between November 1992 and the date the consent
14 decree was signed in 1994?

15 A. That is correct.

16 Q. And you testified that you thought
17 everyone was on board with the commitment that
18 was made in November 1992?

19 A. I believe that was my testimony, yes.

20 Q. But you knew at this time, didn't you,
21 that not everyone was on board? You knew that
22 the Department of Justice was not on board,
23 didn't you?

24 A. I wasn't dealing with the Department of
25 Justice. I don't know what their position was.

1 I assume they represent the EPA. I guess I would
2 add to that, if I could. The first two
3 complaints that were filed in the lawsuit
4 followed this concept.

5 Q. You knew that the U.S. Department of
6 Interior wasn't on board, didn't you, because you
7 knew they were very concerned about natural
8 resource damages claims so they weren't on board
9 with definition of the site as only this
10 21-square-mile area?

11 A. Prior to the filing of the Federal
12 lawsuit, folks claiming to be the Federal
13 trustees didn't have a whole lot of involvement
14 in the negotiation process.

15 Q. You certainly knew that the Coeur
16 d'Alene Tribe of Indians wasn't on board, that
17 they were advocating that the site box be bigger
18 than the 21-square-mile area, didn't you?

19 A. Yes. But you have to put that in
20 context of what was going on at the time also.
21 That lawsuit was filed as a place holder pending
22 the outcome of the issue.

23 Q. Let me have you turn your attention to
24 Defendants' Exhibit G. This is a letter that is
25 admitted in evidence. It is signed by an ASARCO

1 representative on the last page. Can you tell me
2 who it was that signed this?

3 A. That would be Robert J. Kupsch, he was
4 vice president of mining for ASARCO at the time.

5 Q. I think you testified before that
6 correspondence of this sort would have been
7 something that you would have seen a copy of; is
8 that correct?

9 A. That is correct.

10 Q. I would ask you to turn your attention
11 to page 2 of this exhibit. And in the very
12 bottom paragraph of this exhibit, give you an
13 opportunity to read the paragraph that begins
14 with the "we understand" language.

15 A. Yes.

16 Q. Isn't this letter saying that ASARCO
17 knew that the Department of Justice and the
18 Department of Interior were not on board with a
19 narrow definition of the site?

20 A. It would imply that.

21 Q. And this was just about two months
22 before the commitment letter that we looked at
23 just a minute ago; is that right?

24 A. Yes.

25 Q. You spoke in your direct testimony

1 about the start of the actual consent decree
2 negotiations that began after the commitment
3 letter we have talked about, correct, that
4 negotiation process?

5 A. It had actually been an ongoing
6 principle for some time. Formal negotiation
7 process would have begun with the issuance or
8 submittal of the good faith offer.

9 Q. And do you remember when that was?

10 A. January of 1993.

11 Q. So the formal negotiation process
12 didn't begin until January of 1993, right?

13 A. That is correct.

14 Q. And even at the time that ASARCO made
15 its offer to the company or excuse me, offer to
16 EPA, the company was concerned about the
17 direction that the Basin Restoration Project was
18 taking, wasn't it?

19 A. I believe we felt there was some
20 litigation posturing going on associated with the
21 Tribal lawsuit.

22 Q. And you were concerned that the Basin
23 project might lead to the designation of
24 additional Superfund sites in the Basin, weren't
25 you?

1 A. There was some concern.

2 Q. And ASARCO was concerned in January
3 1993 that the Basin project might lead to
4 Superfund enforcement activities in the Basin,
5 weren't you?

6 A. I don't know that I see where that is
7 stated in the letter.

8 Q. What is it you are looking at?

9 A. The September 1992 letter.

10 Q. I was actually going to refer you to
11 the offer letter that you have been talking
12 about. Why don't we look at that, it is Exhibit
13 3, Plaintiffs' Exhibit 3 in the big binder. Can
14 you tell me what the document, that Exhibit 3 is?

15 A. This was the letter transmitting the
16 good faith offer to EPA.

17 Q. And did someone from ASARCO sign a
18 version of this letter? I will tell you the
19 version we have here is not signed by ASARCO.

20 A. Someone from ASARCO would have. I
21 don't remember.

22 Q. Were you involved in preparing this
23 letter?

24 A. I would have been involved indirectly.

25 MR. STONE: Your Honor, we would move

1 to admit Plaintiffs' Exhibit 3.

2 MR. SILVERMAN: We don't object. I am
3 just trying to see if we have --

4 MR. WIELGA: No objection, Your Honor.

5 THE COURT: Plaintiffs' Exhibit 3 is
6 admitted.

7 (Plaintiffs' Exhibit 3 admitted.)

8 BY MR. STONE:

9 Q. I would turn your attention to page 5
10 of Plaintiffs' Exhibit 3 and ask you to read the
11 last paragraph of this page to yourself.

12 A. (Complying.)

13 Q. And it carries over to page 6 so you
14 can read the whole paragraph, please.

15 A. "Additionally, we remain concerned
16 about the direction and activities of the Coeur
17 d'Alene Basin project, as well as the intentions
18 of its sponsors, with respect to Federal and
19 Tribal natural resource damage claims, the
20 possible designation of additional Superfund
21 sites and related enforcement activities. The
22 entities submitting this good faith offer are
23 doing so in part to obtain predictability and
24 certainty about their cleanup-related obligations
25 at the site. Yet decisions relating to the

1 settlement process necessarily are impacted by
2 events outside the Box. As was noted in a letter
3 to Regional Administrator Rasmussen last fall,
4 none of these entities can tolerate or afford
5 being bled to death by a multiplicity of
6 processes and procedures for addressing the Coeur
7 d'Alene Basin drainage."

8 Q. Did you note the indication in this
9 paragraph that ASARCO was concerned about the
10 direction of the activities in the Coeur d'Alene
11 Basin project?

12 A. Yes.

13 Q. And a concern about possible
14 designation of additional Superfund sites?

15 A. That is what it states.

16 Q. And related enforcement authorities?

17 A. Yes.

18 Q. So three months or so after you thought
19 you had a commitment from the EPA, you were
20 telling the EPA you had concerns about this Basin
21 project and where it was going, right?

22 A. That is correct.

23 Q. And concerns that it might lead to
24 listing Superfund sites in the Basin?

25 A. That is what is stated in the letter.

1 Q. And then a little more than a year
2 after you expressed these concerns, ASARCO
3 nonetheless signed a consent decree, right?

4 A. Yes.

5 Q. Let's move forward a few months before
6 we get to the signing of the consent decree. By
7 mid-1993, is it fair to say you were in the midst
8 of the consent decree negotiations with EPA?

9 A. Yes, we were.

10 Q. And you were a participant in those
11 negotiations you said?

12 A. I was.

13 Q. Do you recall the Basin project
14 framework document being released in June of
15 1993?

16 A. Yes, I have seen that document.

17 Q. And even before it was released in June
18 1993, had you reviewed earlier drafts of that
19 document?

20 A. I was not the primary ASARCO person
21 dealing with Coeur d'Alene Basin issues at that
22 point in time outside of the Superfund site. I
23 was involved with the negotiations regarding the
24 inside Superfund site work.

25 Q. And I think you had also testified that

1 Hecla was actually taking the lead on monitoring
2 the Coeur d'Alene Basin project as between the
3 two mining companies; is that right?

4 A. That is correct.

5 Q. Let me draw your attention to
6 Defendants' Exhibit J. What is Defendants'
7 Exhibit J?

8 A. It is a letter from Matt Fein to Lynn
9 McKee.

10 Q. And who is Matt Fein?

11 A. Matt Fein was the Coeur d'Alene Basin
12 project manager for Hecla Mining Company.

13 Q. And you said Hecla was taking the lead
14 on the Coeur d'Alene Basin project. Was it
15 Mr. Fein in particular who was playing that role
16 for Hecla?

17 A. Yes.

18 Q. And is this a letter that you would
19 have received in your efforts to monitor what was
20 going on in the Coeur d'Alene Basin generally?

21 A. I would have received it, yes.

22 MR. STONE: Your Honor, we would move
23 admission of Defendants' Exhibit J.

24 MR. WIELGA: No objection, Your Honor.

25 MR. SILVERMAN: No objection.

1 THE COURT: Defendants' Exhibit J is
2 admitted.

3 (Defendants' Exhibit J admitted.)

4 BY MR. STONE:

5 Q. Do you see the sentence, I believe it
6 is the third sentence on the first page begins
7 with the word "unfortunately."

8 A. Yes.

9 Q. It says, "Unfortunately, information
10 discussed at recent public meetings by various
11 committees associated with the project leads us
12 to believe that the project is now being formed
13 in part as a vehicle and a redundant vehicle for
14 CERCLA enforcement." Do you see that?

15 A. Yes.

16 Q. When you received this letter, did you
17 understand that as an expression of concern that
18 the Basin project was being used as a vehicle for
19 CERCLA enforcement in the Basin?

20 A. As I stated, I had very little to do
21 with the Coeur d'Alene Basin project and was not
22 at any of these meetings, so my first response
23 was probably really I don't know what he was
24 talking about.

25 Q. Were you generally aware that Mr. Fein

1 as the lead for the mining companies in
2 monitoring this project was unhappy that CERCLA,
3 Superfund was playing such a prominent role in
4 the Basin project?

5 A. Well, I would have thought that CERCLA
6 removal action authority would have been an
7 important part of the Basin project. The only
8 part ASARCO was interested in avoiding was
9 remedial actions by CERCLA under RI/FS. All of
10 our projects that we were involved in,
11 particularly trustee projects, were using CERCLA
12 authority to undertake as kind of the basis of
13 the project.

14 Q. Do you see in the enumerated items
15 there is item 1 and the second sentence says,
16 "Nowhere in the framework is it said CERCLA
17 authorities will be used as a last resort, rather
18 the use of CERCLA is mentioned on 13 of 25
19 pages." Did ASARCO want -- I think you just
20 testified ASARCO didn't want Superfund to be a
21 last resort outside the Basin.

22 A. That is correct. I have stated
23 publicly Superfund can be your friend if used
24 properly.

25 Q. So was there a difference of opinion

1 between ASARCO and Hecla at this point on whether
2 Superfund was a good thing or a bad thing outside
3 the Basin?

4 A. Well, in the context that he is writing
5 this, I don't know if he is speaking as to
6 removal actions or use of RI/FS. I think we
7 would have agreed that the framework was
8 contemplating expanding the Superfund site and
9 using an RI/FS. I don't believe that is what the
10 framework says.

11 Q. Then let's look at the framework. Let
12 me have you turn your attention to Defendants'
13 Exhibit M as in Mary. Do you recognize
14 Defendants' Exhibit M?

15 A. Yes.

16 Q. And is it a document that you reviewed
17 at the time it was issued?

18 A. I would have not put a lot of time into
19 it, but I would have reviewed it, yes.

20 Q. And what is it?

21 A. It is the framework for the Coeur
22 d'Alene Basin Restoration Project.

23 Q. Do you remember whether this document
24 talks about the possibility of listing additional
25 Superfund sites in the Basin?

1 A. I don't recall just skimming it again.

2 Q. I am going to have you turn to what is
3 noted as page 16 in the upper right-hand corner.
4 That doesn't help much, it is not easy to read.
5 The sentence I am going to direct you to carries
6 over to page 17. It says, "Appropriate CERCLA
7 actions might include either implementation of
8 removal actions or additional to the National
9 Priority List." Do you see that?

10 A. Yes.

11 Q. Is that an indication that Superfund
12 remedial actions outside the Box were a
13 possibility in June 1993?

14 A. Yes, it talks about additions to the
15 National Priority List, but not expansion of the
16 existing site.

17 Q. Okay, but Superfund remedial authority
18 could have been exercised either by expanding the
19 existing site or by naming other sites; isn't
20 that right?

21 A. I suppose.

22 MS. BASKIN: Counsel, can you hold up
23 for just a minute.

24 THE COURT: Go ahead.

25 BY MR. STONE:

1 Q. Do you see further down page 17 there
2 is a paragraph that begins with the words, "When
3 sites are determined to be appropriate for
4 inclusion on the NPL." Why don't you read that
5 to yourself, you don't need to read it aloud.
6 Just that paragraph.

7 A. (Complying.) Yes.

8 Q. That is describing both the process for
9 listing NPL Superfund sites and the process for
10 selecting remedial action; isn't it?

11 A. Yes.

12 Q. And this framework document that we are
13 looking at, you understand the EPA played an
14 important role in drafting this document, don't
15 you?

16 A. They had a role in the restoration
17 project.

18 Q. In fact, they were one of three members
19 of the steering committee, weren't they?

20 A. That is correct.

21 Q. The other two were the State and the
22 Coeur d'Alene Tribe?

23 A. That is my understanding.

24 Q. And you said before that you viewed the
25 Basin plan and remedial authority as mutually

1 exclusive alternatives, didn't you?

2 A. Yes.

3 Q. But doesn't this document say that
4 remedial authority might be part of the Basin
5 plan?

6 A. I believe it is talking about discrete
7 sites. They are talking sites meaning multiple
8 sites are determined to be appropriate for
9 inclusion on the NPL.

10 Q. But I will rephrase the question.
11 Doesn't this show that Superfund remedial
12 authority might have been one of the tools that
13 was used in the Basin project?

14 A. That is what this framework is
15 implying.

16 Q. And as I think you testified earlier,
17 not only this framework document, but other
18 descriptions of this framework of the Basin plan
19 talk about a multimedia approach, right?

20 A. That is correct.

21 Q. And a multimedia approach in sort of
22 environmental jargon means an approach under
23 multiple environmental statutes, right?

24 A. That is correct.

25 Q. And you knew, didn't you, that the

1 Basin plan as it was outlined in public documents
2 like this envisioned some use of Superfund
3 authority, right?

4 A. That is correct.

5 Q. And some use of Clean Water Act
6 authority, right?

7 A. That is correct.

8 Q. And maybe some use of other statutes?

9 A. As well as voluntary activities taken
10 on by anybody who was so compelled.

11 Q. Let's go back just one more time to the
12 Defendants' Exhibit I and on page 3 of that
13 document is the sentence that we focused on
14 before and that you focused on with Mr. Silverman
15 that it is the indication that the Basin project
16 would proceed separately from consent decree
17 negotiations. Was that your understanding that
18 those were really separate issues going into the
19 negotiations?

20 A. Yes.

21 Q. Let me have you turn to Plaintiffs'
22 Exhibit 5. This is a July 1993 letter. July
23 1993 was in the midst of the consent decree
24 negotiations, wasn't it?

25 A. That would be correct.

1 Q. And this is a letter sent by both
2 ASARCO and Hecla to EPA, right?

3 A. That is correct.

4 Q. And I turn your attention to page 7 of
5 this letter and ask you to look at item 10. Why
6 don't you read item 10 for us.

7 A. "While not strictly a consent decree
8 issue, EPA should be aware that ASARCO and Hecla
9 remain concerned about the relationship between
10 the activities to be required by any consent
11 decree and other off-site cleanup requirements
12 and initiatives. The need for some
13 predictability and certainty in this regard
14 remains."

15 Q. And do you know what it is referring to
16 when this letter references off-site cleanup
17 requirements and initiatives?

18 A. Well, this is lawyer jargon, but I
19 assume it is referring to outside of the Box.

20 Q. And it is your lawyer's jargon, isn't
21 it? Is that a reference to the Basin project?

22 A. I don't know.

23 Q. But this paragraph expresses remaining
24 concerns about activities outside the Box, right?

25 A. That is what it states.

1 Q. This is July 1993 about eight months
2 after the November letter from Ms. Rasmussen,
3 right?

4 A. That is correct.

5 Q. And about seven months before you
6 signed any consent decree, right?

7 A. That is correct.

8 Q. And this letter also reinforces the
9 point we just covered, that off-site issues were
10 not a consent decree issue, right?

11 A. It says it is not strictly a consent
12 decree issue.

13 Q. That is right; not strictly a consent
14 decree issue. That is fair, isn't it?

15 A. Yes.

16 Q. Have you seen this letter before,
17 Exhibit 5?

18 A. I don't recall. I probably did see the
19 letter seeing as my attorneys were signatories to
20 it.

21 Q. As you said before, you would normally
22 receive letters of this sort when you were
23 involved in the consent decree negotiations?

24 A. Yes.

25 Q. You were, in fact, the lead technical

1 representative for ASARCO in the consent decree
2 negotiations?

3 A. That is correct.

4 MR. STONE: Your Honor, we would move
5 to admit Exhibit 5.

6 MR. SILVERMAN: No objection.

7 MR. WIELGA: No objection.

8 THE COURT: Exhibit 5 is admitted.

9 (Plaintiffs' Exhibit 5 admitted.)

10 THE COURT: We are going to take a
11 15-minute recess. Counsel, it might be a little
12 bit longer than that. The Court has to address a
13 jury issue. We are going to have to pick up the
14 pace considerably.

15 MR. NICKLES: Your Honor, are there any
16 guidelines on the length of cross-examination in
17 the merits trial?

18 THE COURT: I didn't set them, but I
19 wish I would have.

20 MR. STONE: Your Honor, I will tell you
21 I think I have about five more minutes.

22 (Whereupon, recess.)

23 THE COURT: You may proceed with
24 cross-examination.

25 BY MR. STONE:

1 Q. Mr. Pfahl, let me have you turn to the
2 Record of Decision, which is Defendants'
3 Exhibit F.

4 A. Was that F?

5 Q. F as in Frank, yes. You said you
6 reviewed the Record of Decision at the time it
7 was issued?

8 A. Yes.

9 Q. Did you also review the Agency's
10 response to comments that it had received on the
11 draft Record of Decision, which is part of this
12 exhibit?

13 A. Yes.

14 Q. Let me have you turn to page A-11.

15 A. What page?

16 Q. A-11. It is towards the back of the
17 exhibit. And do you see the comment that is
18 under the caption "Site Boundary Issues"?

19 A. Yes.

20 Q. And EPA's response to that?

21 A. I do.

22 Q. And is it your understanding that EPA
23 had received a comment indicating that this
24 Record of Decision should address contamination
25 outside the Box?

1 A. It states the next phase in the
2 Superfund study should address the contamination
3 levels of Cataldo Flats and the lower river.

4 Q. Then EPA responded that other
5 contaminated areas within the Basin may be
6 evaluated and addressed separately, right?

7 A. That is correct.

8 Q. And they may be addressed separately
9 under Superfund and/or other statutory
10 mechanisms, right?

11 A. That is what it states.

12 Q. And this, once again, this Record of
13 Decision didn't specify any cleanup activities
14 that were required to be performed outside the
15 confines of the Box, did it?

16 A. No, it did not specify any cleanup
17 actions outside of the Box.

18 Q. Now, ASARCO signed a consent decree in
19 1994, right?

20 A. That is correct.

21 Q. You didn't sign that consent decree?

22 A. No, I did not.

23 Q. Do you remember who did?

24 A. It would have either been Tom Osborn
25 who was the executive vice president of mining or

1 Robert Kupsch who was the vice president of
2 mining for ASARCO.

3 Q. You didn't make the final decision that
4 ASARCO should sign that consent decree, did you?

5 A. I did not.

6 Q. I think you testified earlier that you
7 were aware of no major -- no change in the
8 government's position regarding the Basin project
9 until the RI/FS was announced in 1997 or 1998; is
10 that right?

11 A. That is correct.

12 Q. But were you here during Mr. Brown's
13 testimony?

14 A. Yes, I was.

15 Q. And did you hear Mr. Brown testify that
16 the Basin project had started falling apart even
17 before that in 1996?

18 A. I don't recall that exact testimony.

19 Q. Did the Basin project start falling
20 apart in 1996?

21 A. I don't recall that. I don't think it
22 really fell apart until everybody took a
23 litigation posture sometime about that time
24 frame.

25 Q. Now, after a press release was issued

1 indicating an intention to undertake a remedial
2 investigation and feasibility study in the Basin
3 at large, ASARCO has done a substantial amount of
4 work under the 1994 consent decree?

5 A. That is correct.

6 Q. And you described some of that, there
7 were hundreds of residential properties that have
8 been cleaned up since then?

9 A. That is correct.

10 Q. And you testified in your direct about
11 the financial difficulties that ASARCO has
12 suffered since 1997, right?

13 A. Yes.

14 Q. Virtually all American mining companies
15 have suffered financial difficulties since 1997,
16 haven't they?

17 A. No.

18 Q. Have metals prices affected the
19 profitability of the American mining industry?

20 A. Certain mining companies have produced
21 certain commodities.

22 Q. Is ASARCO one of those companies that
23 has been adversely affected by metals prices?

24 A. Over the last two years, yes.

25 MR. STONE: I think that is all, Your

1 Honor.

2 THE COURT: State of Idaho.

3 CROSS-EXAMINATION

4 QUESTIONS BY MR. FRANSEN:

5 Q. Mr. Pfahl, after all that I get to be
6 brief.

7 A. Thank you.

8 Q. Now, first you testified on direct and
9 I think just a minute ago that CBRP fell apart
10 soon after the Federal government instituted its
11 natural resource damage lawsuit?

12 A. That is correct.

13 Q. You testified that it fell apart
14 because the parties at that time took a quote
15 "litigation posture" at that time?

16 A. That is correct.

17 Q. Did the State take a litigation posture
18 at that time?

19 A. No, they did not.

20 Q. Is it fair to say that since that time
21 the State has made repeated efforts to resolve
22 the Basin issues, the remaining Basin issues
23 without further litigation?

24 A. That is a fair statement, yes.

25 Q. Now, you testified as to the allocation

1 that was reached between the PRPs before the
2 initial negotiations on the '94 consent decree or
3 what became the '94 consent decree; is that
4 correct?

5 A. That is correct.

6 Q. And you stated that the PRPs reached a
7 settlement agreement between themselves as to
8 that relative allocation; is that correct?

9 A. That is correct.

10 Q. And part of that allocation put the
11 Pinehurst work in I guess the group 2 area of
12 work; is that correct?

13 A. That is correct.

14 Q. Did the governments have anything to do
15 with that allocation, the allocation between the
16 PRPs?

17 A. No, they did not.

18 Q. Did the government participate in the
19 negotiation between the PRPs regarding the
20 allocation?

21 A. No, they did not.

22 Q. Was the settlement agreement you
23 referenced ever disclosed to the governments?

24 A. I do not believe it was ever disclosed.

25 Q. To your knowledge, has it been

1 disclosed to the State?

2 A. Not to my knowledge.

3 Q. Have Hecla or ASARCO performed any work
4 in the Box or taken on any obligations regarding
5 the Box as a result of EPA's pursuit of its
6 CERCLA or remedial authorities in the Basin?

7 A. Could you restate that question?

8 Q. Let me make break it down a little bit.
9 Has Hecla or ASARCO performed any additional work
10 in the Box or any work in the Box at all as a
11 result of EPA's pursuing its own remedial
12 authorities in the Basin?

13 A. No.

14 Q. And likewise, has Hecla or ASARCO
15 assumed or taken on any obligations in the Box,
16 future obligations in the Box because of the
17 remedial investigation/feasibility study being
18 performed by EPA at this time?

19 A. That is additional obligations in the
20 Box?

21 Q. That is correct.

22 A. No, they have not.

23 Q. At this time has the unfinished Basin
24 remedial investigation/feasibility study and any
25 potential ROD that might be issued sometime in

1 the future had any or resulted in any obligations
2 to Hecla or ASARCO?

3 A. Are you referring to in the Box or in
4 general?

5 Q. In general?

6 A. There has been no ROD issued.

7 Q. So, therefore, there has been no
8 additional obligations, no work obligations
9 imposed upon Hecla or ASARCO at this time?

10 A. None come to mind.

11 MR. FRANSEN: Thank you.

12 THE COURT: Redirect.

13 REDIRECT EXAMINATION

14 QUESTIONS BY MR. SILVERMAN:

15 Q. Mr. Pfahl, briefly speaking to that
16 last point that Mr. Fransen was asking you about
17 with respect to additional work obligations, is
18 it your understanding that ASARCO has retained
19 attorneys to represent it in the course of the
20 ongoing RI/FS with respect to the Box?

21 MR. STONE: Objection, leading.

22 THE WITNESS: I understand --

23 THE COURT: One moment. That is a
24 leading question, but it is also not relevant.
25 So sustain the objection:

1 BY MR. SILVERMAN:

2 Q. Speaking of additional work with
3 respect to work obligations with respect to the
4 Box, is it your understanding that the company
5 retains contractors who are commenting on
6 technical documents produced during the course of
7 the RI/FS?

8 MR. STONE: I will object on relevance.

9 MR. SILVERMAN: They opened the door to
10 this, Your Honor.

11 THE COURT: We are speculating.
12 Sustain the objection.

13 BY MR. SILVERMAN:

14 Q. Mr. Pfahl, do you recall being asked
15 about Defendants' Exhibit I which was a letter
16 from Ms. Rasmussen to Art Brown, Augustus
17 Kinsolving and John Simko?

18 A. Yes.

19 Q. Do you recall Mr. Stone asking you
20 about your understanding and what language you
21 rely upon for your understanding of the EPA's
22 commitment? Do you recall those questions?

23 A. Yes, I recall.

24 Q. I will direct your attention to the
25 last sentence of this page. Can you read that

1 into the record?

2 A. "The Agency does not currently intend
3 to expand the use of CERCLA remedial authorities
4 beyond those actions outlined in the Bunker Hill
5 Records of Decision."

6 Q. Is that language that you relied upon
7 in your understanding of their commitment?

8 A. That language and numerous other
9 language contained in many, many documents that
10 were circulating at that time.

11 Q. Do you recall being asked about a
12 letter from Matt Fein to Ms. Lynn McKee dated
13 January 11, 1993, which is Defendants' Exhibit J?

14 A. Yes, I recall the letter.

15 Q. And do you recall being posed questions
16 about the fact that as of the date of January
17 1993 Hecla apparently had concerns about how the
18 Coeur d'Alene Basin Restoration Project was being
19 structured?

20 A. That is what the letter stated.

21 Q. And you recall being asked whether
22 those concerns bore at all on your understanding
23 of whether or not there was a commitment to
24 utilize that process, that multimedia approach
25 outside the Box?

1 A. Yes, I recall that.

2 Q. Let me ask you to turn to Tab K, which
3 is Defendants' Exhibit K. Do you recognize this
4 document?

5 A. Yes.

6 Q. What is this?

7 A. This appears to be the response of Lynn
8 McKee to Matt Fein's letter that we just
9 discussed.

10 Q. And were you asked about this letter?

11 A. No, I was not.

12 Q. And what is the date of this letter in
13 relation to Matt Fein's letter?

14 A. Matt Fein's letter was in January of
15 '93. This response came March 22, 1993.

16 Q. And does this letter, in your
17 understanding of it, address the concerns raised
18 by Mr. Fein with respect to the framework being
19 adopted by the Coeur d'Alene Basin Restoration
20 Project?

21 A. Yes.

22 Q. Let me put it on the overhead here. It
23 is Defendants' Exhibit K. Let me direct your
24 attention to the second full paragraph there.
25 Can you please read that, Mr. Pfahl?

1 A. "As EPA has consistently stated in the
2 past, including the Bunker Hill nonpopulated area
3 Record of Decision and Responsiveness Summary,
4 the Agency does not advocate an expansion of the
5 Bunker Hill Superfund site to address the
6 historical impacts of mining throughout the Coeur
7 d'Alene Basin. The Coeur d'Alene Basin
8 Restoration Project is expected to provide a
9 mechanism for coordinating the authorities of the
10 State of Idaho, Coeur d'Alene Tribe and the EPA
11 to achieve the goals of the Basin project."

12 Q. Can you go forward to read the first
13 sentence of the following paragraph?

14 A. "Further, EPA does not expect CERCLA to
15 be the primary mechanism for achieving
16 environmental restoration in the Basin."

17 Q. And the following sentences as well.

18 A. "Clean Water Act programs are expected
19 to play an important role in the Basin, as are
20 voluntary actions by private parties, including
21 Hecla."

22 Q. And following on to page 2, can you
23 please read the first sentence of the paragraph
24 at the top of that page?

25 A. "While EPA does not advocate expansion

1 of the Bunker Hill Superfund site as a component
2 of the Basin Restoration Project, other aspects
3 of CERCLA authority are expected to play a part
4 in achieving project goals.

5 Q. And is the language as you have read in
6 this letter from Ms. Lynn McKee representative of
7 the EPA consistent with your understanding of the
8 EPA's commitment as expressed throughout this
9 chain of correspondence?

10 A. Again, this is just one more example
11 where EPA representatives restated that
12 commitment that the Superfund site would not
13 expand and it would be handled by the Coeur
14 d'Alene Basin Restoration Project outside the
15 Box.

16 MR. SILVERMAN: Your Honor, ASARCO
17 moves Defendants' Exhibit K into evidence.

18 MR. STONE: No objection.

19 THE COURT: Exhibit K is admitted.

20 (Defendants' Exhibit K admitted.)

21 BY MR. SILVERMAN:

22 Q. Mr. Pfahl, do you recall being asked a
23 series of questions about specific language
24 within a document, Defendants' Exhibit M, the
25 Coeur d'Alene Basin Restoration Project

1 framework?

2 A. Yes.

3 Q. You also recall being asked by
4 Mr. Stone about the EPA's responses to public
5 comments concerning the ROD, correct?

6 A. Yes.

7 Q. Were you aware that this Coeur d'Alene
8 Basin Restoration Project also had a public
9 comment period?

10 A. I believe all the documents which EPA
11 is involved with had a public comment period.

12 Q. Let me direct your attention to page
13 H2-3 of this exhibit, Defendants' Exhibit M,
14 which is in evidence.

15 MR. STONE: It is not actually. I
16 don't believe it is in evidence.

17 MR. SILVERMAN: Your Honor, I will move
18 it into evidence after we use the document. It
19 has already been used extensively on cross.

20 BY MR. SILVERMAN:

21 Q. Mr. Pfahl, would you go ahead and read
22 the comments and the EPA's response to that
23 comment?

24 A. The comment is, "The Lower Coeur
25 d'Alene River, lateral lakes and Lake Coeur

1 d'Alene must still be included in the Superfund
2 cleanup." The response by EPA is: "EPA does not
3 support a major expansion of the Bunker Hill
4 Superfund site. As the framework states, EPA may
5 fund cleanup activities or taken enforcement
6 actions using applicable authorities including
7 CERCLA to compel other parties to undertake
8 cleanups."

9 Q. Now, do you understand the EPA's
10 response here to public comments to be reflective
11 of their commitments as given to the mining
12 companies in the months and years proceeding the
13 finalization of consent decree?

14 MR. STONE: Objection, leading.

15 THE COURT: Sustained.

16 BY MR. SILVERMAN:

17 Q. Mr. Pfahl, did you form an
18 understanding, based upon your review of this
19 framework document, as to whether or not it was
20 consistent with other representations of the EPA
21 about their use of CERCLA authorities?

22 A. I believe I stated earlier I didn't
23 really review this document in detail, but these
24 statements are consistent with the other
25 documents that we have reviewed today.

1 Q. And how are they --

2 A. Conveying the position of EPA not to
3 expand the Bunker Hill Superfund site and to deal
4 with the out-of-the-Box issues through the Coeur
5 d'Alene Basin Restoration Project.

6 Q. And as of the time of the finalization
7 of the consent decree, was that the understanding
8 of the mining companies with respect to the EPA's
9 commitments?

10 MR. STONE: Objection. I think he can
11 testify based on personal knowledge, but not as
12 to the understanding of the mining company.

13 THE COURT: Sustain the objection.

14 BY MR. SILVERMAN:

15 Q. Was that your understanding as a
16 participant in the negotiations as of the time of
17 the finalization of the consent decree that the
18 EPA's consistent position as stated in these
19 documents was that it would not expand the
20 boundaries of the Superfund site?

21 A. That was my understanding, yes.

22 MR. SILVERMAN: Thank you very much,
23 Mr. Pfahl.

24 Your Honor, I would like to move
25 Defendants' Exhibit M in evidence.

1 MR. STONE: No objection.

2 MR. FRANSEN: No objection.

3 THE COURT: Defendants' Exhibit M is
4 admitted.

5 (Defendants' Exhibit M admitted.)

6 MR. SILVERMAN: Your Honor, as one last
7 housekeeping matter, so the record is clear, I
8 wanted to move Defendants' Exhibit S as in Sam in
9 for illustrative purposes.

10 MR. STONE: What is that?

11 MR. SILVERMAN: The cost summary. It
12 is in for illustrative purposes.

13 MR. STONE: I am not sure I know what
14 that means.

15 MR. SILVERMAN: It means it is a
16 demonstrative exhibit to illustrate his testimony
17 that would be of record to this hearing, as I
18 understand it.

19 Your Honor, do you wish to follow what
20 our practice has been or --

21 THE COURT: I just want to know if
22 there is an objection to this exhibit.

23 MR. STONE: Your Honor, I object to the
24 admission of this exhibit for all the reasons we
25 went through. And in my experience,

1 demonstrative exhibits are for demonstrative
2 purposes, not offered as exhibits admitted.

3 THE COURT: The Court has permitted, as
4 previously stated, that it was going to admit
5 this exhibit and if there needed to be some
6 follow-up, if it was utilized by the Court as far
7 as an offer was concerned, it would be provided,
8 permitted, but the objection is overruled.

9 Defendants' Exhibit S is admitted for
10 illustrative purposes.

11 (Defendants' Exhibit S admitted for
12 illustrative purposes.)

13 MR. SILVERMAN: Thank you, Your Honor.

14 THE COURT: Hecla?

15 MR. WIELGA: We have no redirect, Your
16 Honor.

17 THE COURT: Recross?

18 MR. STONE: Very brief.

19 RECROSS-EXAMINATION

20 QUESTIONS BY MR. STONE:

21 Q. In your original testimony and then
22 just now I think you had testified that there was
23 no -- you knew of no retreat by EPA from its
24 commitment not to use remedial authority outside
25 the Box between November '92 and the time the

1 consent decree was signed. Is that still your
2 testimony?

3 A. Yes.

4 Q. But I was getting the sense during the
5 redirect that the pattern was really more of --
6 more that the company thought it had an assurance
7 and then got a concern and then sought another
8 assurance and then had another concern. Is that
9 the pattern? Is that the way it flowed?

10 A. Well, I think you have to go back to
11 the time period when there were massive amounts
12 of negotiations going on in every direction. And
13 to some extent, yes, every time something new
14 would come up, another letter would be written
15 and the record is pretty clear that we continued
16 to get the same response over and over again.

17 Q. So the letters that we are looking at
18 were really just part of the negotiation process
19 that led up to the consent decree?

20 A. That is correct.

21 MR. STONE: That is all.

22 THE COURT: State of Idaho.

23 MR. FRANSEN: Nothing further.

24 THE COURT: You may step down, sir.

25 Again, I am going to have to take a

RECORD OF DECISION

**Bunker Hill Mining and Metallurgical Complex
Residential Soils Operable Unit
Shoshone County, Idaho**

**Notice: This material may be protected by
Copyright law (title 17, U.S. Code)**

August 1991

Exhibit 5

9 THE SELECTED REMEDY

9.1 INTRODUCTION

IDHW and U.S. EPA have selected Alternative 3 (as modified by public comments) as the remedy for contaminated residential soils at the Bunker Hill site. This selection is based on the Administrative Record for the site. This remedy addresses surficial residential soils only in currently established residential areas. Because of the extent of contamination, both areal and at-depth, this remedy does not focus on complete removal of contamination from residential yards, but focuses on creating a barrier between contaminants and residents. The remedy employs both engineering and institutional controls to create and maintain the barrier.

9.2 RESIDENTIAL SOILS REMEDY

This remedy is made up of the following components:

SOIL SAMPLING

Approximately 60 percent of residential properties have been sampled at the 0- to 1-inch interval. Prior to commencement of remedial action on a specific yard, sampling will be required at the 0- to 1-, 1- to 6-, 6- to 12-, and 12- to 18-inch intervals. The sampling will be conducted in accordance with established sampling procedures for this site including analysis of soil passing an 80-mesh screen for determination of the 1,000 ppm threshold level.

REMOVAL/REPLACEMENT OF SOILS

The removal of contaminated soil and sod and consequent replacement with compacted clean material will be conducted as follows:

If the 0- to 1-inch or 1- to 6-inch-depth intervals exceed the threshold level, 6 inches of contaminated material will be excavated and replaced. In addition, if the 6- to 12-inch interval exceeds the threshold level, another 6 inches (total of 12 inches) will be removed and replaced. If the 6- to 12-inch interval does not exceed the threshold level, the property will have a 6-inch excavation and replacement.

In the case where the 6- to 12-inch-depth interval exceeds the threshold level but the 0- to 1-inch and 1- to 6-inch intervals do not, 12 inches of material will be excavated and replaced.

If the 0- to 1-inch and the 1- to 6-inch and the 6- to 12-inch intervals do not exceed the threshold level, the property will not be remediated.

All produce garden areas in every yard will receive 24 inches of clean material. Clean soil for produce gardens will be made available to residents whose yards do not require remediation.

If existing property grades permit, it is possible that no excavation of residential soils would be necessary and the cover material could be placed and revegetated without exceeding the height of the foundation. However, it is more likely that some cut and removal of existing soil will be required to properly accommodate the clean cover and new sod.

For each residential yard, the exact nature of the remediation (i.e., how much sod to replace, which bushes to remove, etc.) would have to be considered on a case-by-case basis. However, for consistency, the following areas would generally be remediated within each yard:

- Sod areas
- Roadway shoulders (if curb and gutter are not present) to asphalt or pavement and to the lateral extension of property lines
- Alleys (if unpaved) to the extension of the lot lines
- Landscaped areas
- Garden areas
- Unpaved driveways
- Garages with dirt floors
- Storage areas

Areas immediately associated with the residential properties (i.e., road shoulders and alleys) will not require top soil, but will require replacement with clean material in kind or a permanent cover. Any steep hillside areas located immediately adjacent to yards and with a soil lead concentration greater than the threshold level will be stabilized as part of this action to prevent runoff and recontamination. The final remedy for the hillsides will be addressed in a subsequent ROD.

Based on dose response modeling, a threshold level of 1,000 ppm lead in residential soil was determined to be the threshold cleanup level most appropriate for this site. The results of the threshold assessment, and the assumptions used, are summarized in Table 9-1.

Requirements for removal and replacement of soils on areas adjacent to residential lots, such as vacant residential lots, within the Populated Areas will be the same as for occupied properties.

VISUAL MARKER

For residential yards that require excavation to 12 inches, if the results of sampling in the 12- to 18-inch interval exceed the threshold level, a visual marker (such as erosion control fabric or other suitable material) will be placed prior to backfilling with clean fill.

REVEGETATION

During the excavation process, all existing sod and soil coverings will be removed and disposed of along with the soil. Larger trees and shrubs will be left in place but subject to pruning. After spreading, compaction, and grading, clean fill will be revegetated. The lawn areas of remediated yards will generally be revegetated with sod. Steep hillsides and other remediated areas not currently planted with lawns (such as vacant lots) will be stabilized and hydroseeded with native grasses. If preferred by a property owner, hydroseeding with native grasses could be substituted for the sod. Vacant lots will be hydroseeded with native grasses after remediation. To the extent practicable, all yard landscaping will be returned to its original condition.

Table 9-1
Risk Range for a Threshold Level of 1,000 ppm

1,000 ppm Threshold Scenarios		No. of Homes Remediated	Post Remediation Predicted Mean				% of Children Predicted to Exceed		
			Yard Soil	House Dust	Blood Lead Level µg/dl		10 µg/dl	15 µg/dl	25 µg/dl
			Pb Conc ppm	Pb Conc ppm	1-3 yrs	1-10 yrs			
Kellogg	1	958	121	1,450	7.5	7.0	15-24	2-7.8	<1-1.0
	2	958	121	121	2.8	2.7	<1-1.6	<1	<1
	3	958	121	143	2.9	2.8	<1-1.6	<1	<1
Smelterville	1	238	122	1,203	6.6	6.1	9-18	1.3-5.1	<1
	2	238	122	122	2.8	2.7	<1-1.6	<1	<1
	3	238	122	145	2.9	2.8	<1-1.6	<1	<1
Wardner	1	90	174	1,450	7.4	6.9	16-25	1.9-8.0	<1-1.0
	2	90	174	174	3.4	3.2	1.5-3.8	<1	<1
	3	90	174	255	3.6	3.4	1.5-4	<1	<1
Page	1	24	278	1,330	7.4	6.9	16-25	1.9-8.0	<1-1.0
	2	24	278	278	3.9	3.8	1.8-5.5	<1-1.3	<1
	3	24	278	440	4.2	4.0	1.8-6.0	<1-1.4	<1
Pinchurst	1	143	275	747	5.1	4.8	2.5-9.0	<1-2.0	<1
	2	143	275	275	3.8	2.6	1.5-4.7	<1-1.0	<1
	3	143	275	356	4.0	3.8	1.5-5.0	<1-1.0	<1

Notes: This remedial scenario assumes replacement of all yards with soil lead concentration exceeding 1,000 ppm cleanup threshold. The total number of homes is estimated to be 1,453. Three alternate scenarios assuming a 1,000 ppm threshold cleanup level were evaluated under the following assumptions:

Threshold Scenario

1. Yard Soil Concentration--All yards with levels of >1,000 ppm lead replaced with soils of 100 ppm Pb.
House Dust Concentration--As observed in 1988.
Indoor:Outdoor Partition--70%:30%.
2. Yard Soil Concentration--All yards with levels of >1,000 ppm lead replaced with soils of 100 ppm Pb.
House Dust Concentration--Equal to soil concentration on individual home basis.
Indoor:Outdoor Partition--70%:30%.
3. Yard Soil Concentration--All yards with levels of 1,000 ppm lead replaced with soils of 100 ppm Pb.
House Dust Concentration--Equal to community mean yard soil level at remediated homes, equal to yard soil at nonremediated homes.
Indoor:Outdoor Partition--70%:30%.

DUST SUPPRESSION

Dust suppression measures will be implemented throughout the remediation process to reduce exposure of workers and residents to airborne contaminants. Dust suppression will include, but not be limited to:

- Watering of residential yard areas prior to excavation activities
- Continued watering during excavation, as necessary
- Placement of tarps or covers over excavated materials
- Use of tarps or covers over truck beds to reduce blowing dust and spillage during transportation to the waste repository
- Daily cleanup of all spilled or tracked soils from sidewalks, roadways, etc.

DISPOSAL OF CONTAMINATED MATERIALS

The analysis of Applicable or Relevant and Appropriate Requirements associated with the disposal of contaminated residential soils assumed that the soils repository would be located within the Bunker Hill site. It is recommended that Page Ponds be used for the disposal repository because it has adequate volume, is within the Bunker Hill site, and the action will reduce the contaminated windblown dust originating from the Page Ponds area.

The use of Page Ponds as the repository will require that it be capped to minimize airborne contaminant migration and reduce the threat of direct contact exposure. The cap surface area will be compacted and graded to prevent ponding and minimize infiltration; it will also be vegetated for stabilization and moisture absorption. Access to the area will be restricted by fencing, locked gates, and warning signs. Future use of the repository will be limited and subject to institutional controls.

If Page Ponds is not used as the residential soil repository, the chosen repository site will be subject to agency evaluation and public notification.

INSTITUTIONAL CONTROLS

The goal of the institutional controls program is to develop a flexible system that builds on existing administrative structures and programs rather than create a new layer of bureaucracy. Institutional controls regulation will be uniform throughout the Bunker Hill site, irrespective of jurisdictional boundaries. The institutional controls associated with this ROD are designed for the maintenance of residential soil barriers only. These controls are necessary and are an integral part of the selected remedy.

Physical Program Requirements

Planning, Zoning, Subdivision and Building Permit Regulations: Implementation of planning, zoning, and subdivision controls through local ordinances, designed to protect and maintain barriers when development or any action that would breach a barrier takes place.

Disposal of Unearthed Contaminants: When a barrier is broken, contaminated soils that are removed must be handled to minimize exposure, collected for disposal, and transported to a proper disposal site. A means for disposal of incidental contaminated soils will be provided to residents.

Provision of Clean Soil: A program will be implemented to provide a centrally located supply of clean replacement soil (both fill and topsoil) to facilitate barrier repair, maintenance, and establishment of produce garden areas.

Administrative Program Requirements

Coordination of Public Institutions: Effective administration of a uniform Institutional Controls Program will require shared authority and resources. The four cities and Shoshone County will play an important role through already established permitting procedures. It has been recommended that the Panhandle Health District will administer the effort with permitting, inspection, records maintenance, and enactment of regulations, where necessary, across jurisdictional boundaries.

Deed Notices: These are a method to notify new owners of their barrier system and their responsibility for participation in that system.

Educational Programs: Educational programs will be developed to keep information about the barrier system in the public eye and to help the public recognize when disruption of the barrier systems requires attention or caution. Distribution of information should be provided through pamphleting, brochures, and general media exposure.

Permitting and Inspection Procedures: Permit issuance and recordkeeping procedures should be tailored to minimize inconvenience to permit applicants. A permit system that integrates with existing permit routines will be implemented.

Monitoring and Health Surveillance Programs: Monitoring will be required to assure both program performance and effectiveness. Health intervention efforts will be required to document and assess success in achieving remedial goals and objectives.

An Evaluation of Institutional Controls for the Populated Areas of the Bunker Hill Superfund Site outlines the various options associated with each of the institutional control requirements and will be used in the remedial design phase to guide implementation of the program. The implementation phase, referred to as Phase II, will include passing local ordinances, setting up an administrative system to oversee and run the program, and development of detailed procedures for each of the program components.

MONITORING

The effectiveness of the institutional controls program will be evaluated periodically. Appropriate air monitoring will be conducted to identify the occurrence of contaminant migration during remedial activities. Any exceedances of the standards will result in immediate implementation of additional dust suppression measures or a shutdown of construction activities.

Since contaminated material will be left onsite, both in Populated and Non-populated Areas, ongoing monitoring of fugitive dust and residential yards is necessary to ensure that the clean barrier is maintained.

9.3 CHANGES TO PROPOSED PLAN

During the public comment period, several issues were raised concerning the preferred alternative in the Proposed Plan; consequently, several minor modifications have been incorporated into the selected remedy in response to those concerns. The following is a list of those modifications:

- Depth of excavation may be variable (less than 12 inches) depending on depth of contamination.
- For those properties requiring a visual marker, it will be a material that can be easily seen during digging or excavation activities. The visual marker does not have to be a 2-inch gravel layer.
- Requirements for disposal site closure included an impermeable cap to protect groundwater. ARARs associated with groundwater and surface water protection will be addressed in a subsequent FS and ROD.
- The scope of the institutional controls program will be reevaluated periodically because the requirements of a program of this nature may change with time.
- Soil will be provided for homeowners who have a soil lead level less than 1,000 but who want a garden.

9.4 COST

Cost evaluations, including the assumptions used, are presented in the Feasibility Study. A summary of the capital costs associated with the selected alternative is shown in Table 9-2. The costs are order-of-magnitude (+50 percent to -30 percent) estimates. Capital costs are those required to initiate and construct the remedial action. Typical capital costs include construction equipment, labor and materials expenditures, engineering, and construction management. Bid and scope contingencies are also included in the total capital cost. Projected annual operation and maintenance costs for the selected remedy are also presented in Table 9-2. These costs are necessary to ensure the continued effectiveness of a remedial action. Included are such items as labor and materials; monitoring and the institutional controls program; and insurance, taxes, etc.

The feasibility level cost estimates shown have been prepared for guidance in project evaluation and implementation from the information available at the time of the estimate. The final costs of the project will depend on actual labor and material costs, actual site conditions, productivity, competitive market conditions, final project scope and schedule, and other variable factors. As a result, the final project costs will vary from the estimates presented here.

Present worth costs are calculated using a 5 percent discount rate and a 30-year estimated project life. The present worth cost for the selected remedy is \$40.6 million (Table 9-2). Capital costs and long-term annual operations and maintenance (O&M) costs are included in the total present worth cost. Long-term O&M costs are those associated with maintaining an alternative after implementation is complete.

Costs presented in Table 9-2 are lower than those presented in the Residential Soil Feasibility Study or the Proposed Plan. The reduction in cost is associated with changes to the Proposed Plan as presented in Section 9.3. Specifically, removing the requirement for an impermeable cap accounts for the cost reduction.

9.5 PERFORMANCE REQUIREMENTS

A remedial action objective for this operable unit is to decrease the exposure to lead-contaminated residential soils such that 95 percent or more of the children in the area have blood lead levels below 10 $\mu\text{g/dl}$ and that less than 1 percent have blood leads greater than 15 $\mu\text{g/dl}$. The former is projected to be achieved by reducing the overall soil and dust loading concentration to 700 to 1,200 ppm. The

Table 9-2
Summary of Estimated Costs for Selected Remedy

Item	Capital Cost (\$)	Annual O&M Cost (\$)
Occupied Lots Remediation Total	18,502,000	0
Vacant Lots Remediation Total	3,665,223	0
Disposal Cap	599,078	0
Operations and Maintenance	0	400,209
Health and Safety (10%)	2,276,630	0
Division 1 Costs (8%)	1,821,304	0
Engineering Services (10%)	2,276,630	0
Subtotal	29,140,865	400,209
15% Contingency	4,371,130	60,031
Total Capital Cost	33,500,000	460,000
Total O&M Present Worth	7,100,000	
Total Present Worth	40,600,000	

Notes:

1. Division 1 costs include the costs for general conditions, mobilization, permits, bond, and insurance.
2. The "Occupied Lots Remediation Total" is based on remediation of 1,273 residences.
3. The "Vacant Lots Remediation Total" is based on remediation of 268 vacant residential lots.
4. The present worth was calculated using a discount rate of 5% for 30 years, then rounded to three significant figures.
5. Institutional control costs include personnel, benefits, contractual services, supplies and materials, capital equipment, health intervention program, soil collection program, and material supply program required for annual maintenance of remedial actions.
6. The disposal cap was assumed to be a 1-foot soil cap.
7. Total costs were rounded to three significant figures.

1,000 ppm yard soil threshold cleanup level will reduce mean yard soil concentrations to approximately 200 to 300 ppm in residential areas. In combination with other remedial measures and the positive effects likely to be seen in other media, it is expected that this objective will be met. Achieving the latter objective of less than 1 percent of area children with blood lead concentrations below 15 µg/dl is less dependent on the mean soil/dust concentrations than on the soil concentration left in an unremediated yard. A child living on an unremediated yard of 1,000 ppm is estimated to have a 0.1 to 2.5 percent (depending on various assumptions) chance of exceeding 15 µg/dl blood lead in the Bunker Hill post-remediation environment. Any higher threshold cleanup level would result in unacceptable risk to that child. It is expected that this goal will be achieved by replacing all residential yards with a lead concentration greater than 1,000 ppm lead with clean material (less than 100 ppm). This expectation assumes that fugitive dust sources will be controlled and house dust concentrations will consequently decrease and that remediated yards will not be recontaminated.

This remedy mitigates the risks associated with the following pathways identified in the risk assessment:

- Inhalation/Ingestion of Contaminated Residential Soil
- Ingestion of Locally Grown Produce

This remedy does not directly address the risks associated with the following pathways identified in the risk assessment:

- Consumption of Contaminated Groundwater
- Inhalation/Ingestion of Windblown Dust
- Inhalation/Ingestion of Contaminated House Dust

Actions are being taken now to address these risks. The final remediation with respect to these risks will be addressed in a subsequent feasibility study.

BUNKER HILL "YARD CLEANUP" PROGRAM

Pre-Consent Decree Past Costs

(Actual)

(\$1,000s)

Consent Decree Past Costs

(Actual)

(\$1,000s)

Year	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Total Cost	N/A	N/A	2,413	2,321	586	3,156	4,956	5,904	5,301	5,688	4,069	4,269	3,058	2,984
	← ("HIGH-RISK") →					← (CONSENT DECREE) →								
Total No. Yards	90	142	93	88	39	154	201	207	203	204	200	200	134	62

1991 - 1993 Total \$5.3 million

1989 - 1993 Total Yards 452

1994 - 2002 Total \$39.4 million

1994 - 2002 Total Yards 1,565

1991 - 2002 Total \$44.7 million

1989 - 2002 Total Yards 2,017

BUNKER HILL "YARD CLEANUP" PROGRAM

Remaining "Box" Costs
(Estimated)
(\$1,000s)

Remediation ¹	\$15,935
Project Management	\$850
Oversight/ICP ²	\$1,325
No. of Yards ³	552

Total \$18.1 million
Additional Yards 552

¹ Includes Residential Yards, Commercial Properties, Rights-of-way and Page Pond. Does not include the cost of Large Outlying Properties (LOP's). LOP remediation cost includes approximately \$4 million for known properties in Pinehurst and Kellogg. Other properties to be identified.

² Does not include the final ICP balloon payment (to be based on average annual costs).

³ Assumption based on the estimate of remaining properties and percentage of those sampled over the action level.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

COEUR D'ALENE TRIBE,

Plaintiff,

v.

ASARCO INCORPORATED; GOVERNMENT
GULCH MINING COMPANY, INC.; FEDERAL
MINING AND SMELTING CO., INC.; HECLA
MINING COMPANY, INC.; SUNSHINE MINING
COMPANY, INC.; SUNSHINE PRECIOUS
METALS, INC.; and UNION PACIFIC
RAILROAD COMPANY,

Defendants.

Case No. CV 91-0342-N-EJL

UNITED STATES OF AMERICA,

Plaintiff,

v.

ASARCO INCORPORATED, et al.,
Defendants.

Case No. 96-0122-N-EJL

ORDER

Pending before the Court in the above-entitled matter are a number of motions filed by the parties. The Court finds that certain of the motions can be dealt with based upon the briefing while other motions may require oral argument. In this Order, the Court will address certain motions it finds can be ruled upon based upon the record without prejudice to the parties. D. Id. L. Civ. R. 7.1.

General Factual Background

Plaintiffs United States of America ("USA") and the Coeur d'Alene Tribe ("Tribe") have filed a civil action seeking natural resources damages and a declaratory judgment of liability for future response costs in connection with the Bunker Hill facility in Northern Idaho. The claims are pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. § 9601 et seq. ("CERCLA") and § 311(f) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(f). It is basically undisputed that mining that has occurred over the last 100 years in the Coeur d'Alene Basin has resulted in mill tailings being dispersed and certain natural resources being affected by such mill tailings. The named defendants in the action have raised a number of defenses to the claims and have responded with counterclaims.

Standard of Review for Summary Judgment Motions

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. Rule 56 provides, in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Supreme Court has made it clear that under Rule 56 summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element which is essential to the non-moving party's case and upon which the non-moving party will bear the burden of proof at trial. See, Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If the non-moving party fails to make such a showing on any essential element, "there can be no genuine issue

of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.¹

Moreover, under Rule 56, it is clear that an issue, in order to preclude entry of summary judgment, must be both "material" and "genuine." An issue is "material" if it affects the outcome of the litigation. An issue, before it may be considered "genuine," must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975) (quoting First Nat'l Bank v. Cities Serv. Co. Inc., 391 U.S. 253, 289 (1968)). The Ninth Circuit cases are in accord. See, e.g., British Motor Car Distrib. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371 (9th Cir. 1989).

According to the Ninth Circuit, in order to withstand a motion for summary judgment, a party

(1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

Id. at 374 (citation omitted).

Of course, when applying the above standard, the court must view all of the evidence in a light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Hughes v. United States, 953 F.2d 531, 541 (9th Cir. 1992).

¹ See also, Rule 56(e) which provides, in part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Motions

1. Asarco's Motion for Partial Summary Judgment on Claims for National Resource Damages and Response Costs in Non-Asarco Drainages (Docket No. 722)

Defendant Asarco² seeks partial summary judgment on the USA's and the Tribe's claims for natural resource damages and response costs in certain identifiable areas of the Coeur d'Alene Basin where Asarco did not own a facility, did not conduct mining activities and did not arrange for the disposal of hazardous substances. USA agrees in part with the motion, however, claims that certain identifiable tributaries have been directly affected by Asarco's specific mining activities and are inappropriate for summary judgment and that Asarco should potentially be held responsible for its releases causing damage to any tributaries within the floodplains of the South Fork of the Coeur d'Alene River ("South Fork") and the main Coeur d'Alene River.

In the facts presented to the Court, the parties agree Asarco should not have liability for tributaries in which it did not conduct mining activities and therefore, did not release hazardous substances into such tributaries. Hence, the Court finds that Asarco is correct in its general argument that it should not be held responsible for damages in tributaries in which it did not conduct any mining activities or releases. However, the Court also agrees with USA that there is a genuine issue of material fact as to whether or not Asarco conducted mining activities in certain identified drainages.³ As to the drainages in footnote 3, the Court will have to determine at trial whether or not

²For purposes of this Order, "Asarco" refers to defendants Asarco Incorporated, Government Gulch Mining Company, Inc. and Federal Mining and Smelting Company, Inc.

³The USA claims that Asarco has been involved in mining activities in the following identified tributaries of the South Fork involved in this motion: Grouse Gulch, Silver Creek, and Little Pine Creek.

Asarco conducted mining activities on or near these tributaries that resulted in the release of hazardous substances.

The Court also agrees with the USA that there is a genuine issue of material fact regarding whether or not Asarco's releases in certain identified tributaries⁴ may have damaged the floodplains of the South Fork and the Coeur d'Alene Rivers. To the extent that the USA and Tribe can show that Asarco damaged the rivers and that such damage in turn damaged the rivers' floodplains, Asarco could possibly be liable for damage up a tributary to the extent that tributary is within a floodplain of the aforementioned rivers. CERCLA defines the term "facility" very broadly and includes "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). CWA creates liability for an "owner or operator" of a facility from which hazardous substance was discharged. 33 U.S.C. § 1321(f)(3) and (4). Because hazardous substances could have "come to be located" within the floodplains from other mining activities conducted by Asarco within the Coeur d'Alene Basin, Asarco cannot be granted summary judgment for tributaries located within the floodplains of the South Fork and the Coeur d'Alene Rivers.

For these reasons the motion will be granted in part and denied in part. To the extent Asarco seeks summary judgment on the tributaries in footnote 3 of this Order, and the floodplains of the South Fork and the Coeur d'Alene Rivers, the motion is denied. The summary judgment is granted as to the remainder of the identified tributaries set forth in Asarco's memorandum (Docket No. 725), statement of material facts (Docket No. 724) and the Declaration of Christopher Pfahl (Docket No. 725).

⁴Identified in Asarco's memorandum (Docket No. 723), statement of material facts (Docket No. 724) and the Declaration of Christopher Pfahl (Docket No. 725).

2. Asarco's Motion for Summary Judgment on Clean Water Act Claim (Docket No. 727).

Asarco seeks summary judgment related to the USA's claims pursuant to the CWA. Asarco argues that the USA cannot show there have been discharges of hazardous substances and that the claims are barred by the applicable statute of limitations. USA maintains there is a genuine issue of material fact regarding whether Asarco discharged hazardous substances in the quantities required under the CWA and that the applicable statute of limitations is 6 years, not three years.

Asarco argues that in order for USA to prevail on its CWA claims, it must prove a prima facie case that: 1) there was a discharge of "hazardous substance" as defined by the CWA; 2) that the quantity of such hazardous substances was determined harmful by the EPA; and 3) a violation of § 311(b)(3) of the CWA has occurred.

Asarco first claims that cadmium, lead, zinc, arsenic and mercury are the elements identified by the USA and such are not "hazardous substances" under the CWA which has a narrower definition than CERCLA. Asarco argues the USA failed to identify the actual compounds in its Complaint and therefore no "hazardous substances" as defined under the CWA have been alleged. USA responds that it broadly defined the hazardous substances involved in this case when it listed the specific elements above and "other substances" in its complaint. Clearly, the number of derivative compounds was too extensive to list in the Complaint. For example, lead sulfide is included in the CWA's list of hazardous substances and is the predominant form of lead in the Coeur d'Alene basin. The Court agrees with the USA that using the term "other substances" in the Complaint, the Defendants were put on notice USA was focusing on both the listed elements and other compounds related to the identified elements which are allegedly hazardous substances.

Further, the Court finds there is adequate evidence in the record to create a genuine issue of material fact regarding the discharge of hazardous substances pursuant to the CWA in violation of 311(b)(3).

Second, Asarco argues that USA has not provided any evidence the five pure elements disclosed in the Complaint and via discovery have been released in quantities deemed harmful by the EPA. USA responds that although the pure elements are not listed by the EPA, the "other substances" identified in discovery have been listed by the EPA and the evidence before the Court presents at least a genuine issue of fact as to whether these "other substances" have been released in quantities deemed harmful by the EPA. The Court finds that Asarco is reading the CWA too narrowly. The CWA should be read to effectuate its purpose. Based upon the evidence submitted by the USA, the quantities of the "other substances" (i.e., lead sulfide) which are listed as hazardous substances by the EPA appear to exceed the reportable quantities designated by the EPA. This creates a genuine issue of material fact as to whether the reportable quantities of hazardous substances were discharged by Asarco and/or the other Defendants.

Third, Asarco argues that it cannot be held responsible for any discharges of hazardous substances under the CWA that may have occurred prior to the effective date of EPA's list of CWA designated "hazardous substances," June 12, 1978. USA concedes that it can only seek to hold the Defendants responsible for discharges under the CWA that occurred on or before September 20, 1989 (six years prior to the tolling agreement date September 20, 1995). The USA argument is based upon the six year statute of limitations for CWA claims. The CWA does not set forth a statute of limitations. While Asarco argues that the applicable statute of limitations is 3 years based upon a theory of tort, the Court agrees with the USA that the Ninth Circuit has ruled upon this issue and has held that claims under the CWA are quasi-contractual in nature and subject to a six year statute of limitations. See, United States v. Dae Rim Fishery Co., Ltd., 794 F.2d 1392, 1394 (9th Cir. 1986).

With the statute of limitations determined, the Court is unable to decide as a matter of law whether the claims of the USA are outside the statute of limitations. The request for admission propounded by Asarco queried whether USA became "aware of other otherwise discovered the connection between the alleged releases of hazardous substances at issue . . . more than three (3) years prior to the date the United States entered into the tolling agreement."⁵ The USA admitted it did know of the alleged releases more than three years prior to the date of the tolling agreement.⁶ However, the Court does not have undisputed evidence that the USA had knowledge of the alleged discharges of hazardous substances under the CWA more than six years prior to the date of the tolling agreement. Therefore, a genuine issue of material fact exists as to whether the alleged discharges are within the applicable statute of limitations in this case.

3. Asarco's Motion for Leave to File Summary of Disputed Facts (Docket No. 799).

Asarco seeks leave to file a summary of disputed facts in response to USA's motion for Partial Summary Judgment on CERCLA Counterclaims of Asarco and Hecla. No objection to the motion was filed by any party. Accordingly, for good cause shown, the motion is granted.

4. USA's Motion to Amend Complaint (Docket No. 795).

USA seeks to amend its Complaint to narrow the geographic scope of the case and to add claims for piercing the corporate veil of certain Defendants. The Defendants object to the motion to amend claiming the proposed amendments are prejudicial, will delay the litigation, and are futile.

⁵Asarco's Statement of Undisputed Facts in Support of Motion for Summary Judgment on Clean Water Act Claims, Fact 11, Docket No. 729.

⁶Id.

Pursuant to Fed. R. Civ. P. 15(a), leave to amend a pleading "shall be freely given when justice so requires." However, "leave to amend is not to be granted automatically." Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990). A court should deny a motion to amend "if permitting such an amendment would prejudice the opposing party, produce an undue delay in the litigation or result in futility for lack of merit." Id. Factors to consider in deciding a motion to amend include: bad faith, undue delay, prejudice to the opposing party, the futility of amendment; and whether plaintiff has previously amended its complaint. Forman v. Davis, 371 U.S. 178, 182 (1962). The burden of establishing prejudice is on the party opposing amendment. DCD Program v. Leighton, 833 F.2d 183 (9th Cir. 1987).

As to the USA's request to narrow the geographic scope, the Court agrees that such narrowing is appropriate based upon the representation of USA counsel that discovery has been focused on the South Fork of the Coeur d'Alene River, the Coeur d'Alene River and Lake Coeur d'Alene and has not included the North Fork of the Coeur d'Alene River or the Spokane River.⁷ The USA first made this request in its 1997 motion to add defendants to the litigation. The Court denied the motion to amend to add defendants. The Court finds the current request to narrow the geographic scope is not an attempt by USA to circumvent this Court's ruling regarding the statute of limitations which is currently on appeal. If the USA elects to file an action against any of the Defendants relating to the North Fork of the Coeur d'Alene River and/or the Spokane River, the new action would be subject to the applicable statute of limitations. The complexity of this case is such that reducing the scope will not cause any undue delay in the litigation -- in fact, the amendment should reduce the litigation time for this matter. While making this ruling to reduce the geographic

⁷In the USA's Reply on the Motion to Amend, p. 6: "Discovery has proceeded throughout this litigation based on the parties' mutual understanding that the North Fork and the Spokane River are not included in the United States' claims for relief."

scope, the Court is mindful of the Defendants' argument that they should be entitled to a complete resolution of the claims in the entire geographic area set forth in the original Complaint. However, the Court finds that the Defendants will not be unduly prejudiced since the geographic area being eliminated has not been the focus of the discovery in this case and the Defendants will not have to defend any new claims due to this amendment. Finally, the Court finds that the requested amendment to limit geographic scope is not sought in bad faith and does not constitute an exercise in futility.

In granting the motion to amend to limit the geographic scope, the Court declines to enter an order dismissing any claims regarding the North Fork of the Coeur d'Alene River or the Spokane River with prejudice.

As to the USA's request to add a corporate veil piercing claim, this is a much closer call for the Court. In the original Complaint, USA stated it sought to recover against Defendant parent corporations as owners or operators of facilities. The original complaint did not indicate that USA was also claiming (in addition to proving parent corporations were owners or operators) parent corporations were derivatively liable under a corporate veil piercing theory of recovery. Even with the lenient requirements of notice pleading, it is difficult for the Court to believe the Defendants were on notice of USA's corporate veil piercing theory at the time the Complaint was filed in 1996.

There is limited case law on the issue of whether a corporate veil piercing claim is a separate claim for recovery. Defendant Sunshine Mining and Refining Company cites the Court to Quinn v. Work Force, 2000, Inc., 887 F. Supp. 131, 135 (E. D. Tex. 1995) for the holding "a veil-piercing theory is an independent ground of recovery." In Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, 185 F. 3d 978, 985 (9th Cir. 1999), the court stated in an ERISA action that "[a] request to pierce the corporate veil is only a means of imposing liability for an underlying cause of action and is not a

cause of action in and of itself." (Citing Peacock v. Thomas, 516 U.S. 349, 354 (1996)). The Court finds that it is bound by Ninth Circuit law and rules that the proposed corporate veil-piercing amendment is not a new claim.

Having determined that the proposed amendment does not state a new claim for relief, the Court must determine if the amendment would prejudice the opposing parties, produce an undue delay in the litigation or result in futility for lack of merit. First, the Court finds that allowing the amendment would not prejudice the Defendants. The discovery on the claims has been completed by the USA. Arguably, the Defendants should have realized the Trustees could be seeking derivative liability based upon the Supreme Court's ruling in United States v. Bestfoods, 524 U.S. 51 (1998). Also, during discovery the Defendants became aware that USA was seeking to establish derivative liability under a corporate veil-piercing theory. The very nature of the veil piercing theory establishes that relevant facts are already in the hands of the Defendants regarding corporate structure and control. Besides the lateness of the proposed amendment, the Defendants have failed to carry their burden of establishing prejudice. Prejudice requires something more than inconvenience in having to defend against a new claim. The lateness of the filing of the motion to amend is not grounds to deny the motion. There are numerous cases cited by USA wherein the courts have allowed amendments of complaints shortly before or during trial.

Having determined that the proposed amendment is not an amendment to add a new claim, the Court will examine the sufficiency of the proposed amendment. The Ninth Circuit law on corporate piercing is well-settled. The determination of whether or not to pierce the corporate veil is based upon three factors: (1) the amount of respect given to the separate identity of the corporation by its shareholders; (2) the degree of injustice visited on the litigants by recognition of the corporate entity; and (3) the fraudulent intent of the incorporators. Seymour v. Hull & Moreland

Eng'r, 605 F. 2d 1105, 1111 (9th Cir. 1979). A party seeking to pierce the veil must prevail on the first threshold factor and on either of the other two. US Local 343 v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1475 (9th Cir.), cert. denied, 116 S. Ct. 297 (1995).

While the USA's proposed amendment alleges in a general way the standards for veil piercing, the proposed amendment lacks any factual support for the allegations.⁸ Arguably, the proposed amendment does not satisfy the notice pleading requirement for a veil piercing claim. See, e.g., Resolution Trust Corp. v. Driscoll, 985 F. 2d 44, 48 (1st Cir. 1993) (dismissing veil piercing claim where plaintiff 'allege[d] no facts that, if proved, would even arguably permit a court to impose liability on [a subsidiary] of the acts of its parent under an alter ego theory"). In order for the Defendants to have sufficient notice of the claims at this stage in the litigation, the Court will require the USA to modify its proposed amendment to include concise statements of the alleged facts to support its claims that certain parent corporations controlled subsidiaries to such an extent as to pierce the separate identity of such subsidiaries.⁹ With this modification, the Court finds the amendment of the Complaint would not be futile.

As to the argument that allowing the amendment will delay the litigation, the Court finds that such claim is without merit since the discovery regarding the corporate veil piercing claims has been completed by USA. In addition to requiring a concise summary of the alleged facts to support the USA's claim to be included in the Amended Complaint, the Court will allow each Defendant to serve up to twenty-five (25) written interrogatories upon the USA related to the corporate veil

⁸The Court notes the proposed Amended Complaint does not allege the third factor for piercing the corporate veil, fraudulent intent of the incorporators. Therefore, the Court will not allow USA to seek relief on this basis.

⁹This does not mean USA should restate at length the facts presented in its motions for summary judgment on liability. Rather, the Court wants a concise summary of the particular facts relevant to each parent and subsidiary corporation.

piercing claim to clarify such claims. The interrogatories shall be served within fourteen (14) days of the date the Amended Complaint is filed with the Court. USA shall have twenty-one (21) days to respond to the Defendants' interrogatories. No additional discovery will be allowed since any defense to such claims is presumed to already be in the hands of the Defendants. The Court finds these limited interrogatories will not delay the trial in this matter.

Finally, the Court finds no bad faith on the part of USA in bringing this motion to amend to add veil piercing. For all of the above reasons, the Court will grant the motion to amend in order to expressly set forth a derivative claim for liability against certain Defendants.

Schedule for June 12, 2000 Hearing

A hearing on pending motions is set for June 12, 2000 in Boise, Idaho. The time for the hearing is hereby changed from 9:30 a.m. to **9:00 a.m.** in order to allow the parties adequate time to argue the critical issues. The Court has determined the order it will hear the motions and the amount of time that will be allowed for each motion. The amount of time references total time for all argument on such motion (argument by the moving parties, response by the opposing parties and brief reply by the moving parties.) The time limits will be adhered to in order to complete the hearing on the motions on June 12, 2000. It is up to the parties to determine how to allocate the total time allowed on each motion. The motions will be heard in the following order:

A. Asarco and Coeur d'Alene/Callahan's motions on causation. Time limit: 1 hour.

B. Liability motions by mining company with understanding that USA's argument on the first mining company will be longer than remaining companies when it covers overlapping issues as to all mining companies. Order of motions will be: Asarco, Hecla, Coeur d'Alene/Callahan and Sunshine. Time limit: 3 hours.

C. Sunshine Mining and Refining Company's motion for summary judgment on owner/operator liability. Time limit: 30 minutes.

D. USA's Motion on CERCLA Counterclaims. Time limit: 1 hour.

E. USA's Motion to Dismiss Counterclaims. Time limit: 30 minutes.

F. Trustees' Motion on Affirmative Defenses. Time limit: 45 minutes.

The Court has determined it will decide the USA's motion on BLM lands based upon the briefing and no oral argument on this motion is requested.

As to USA's request for a status conference on Tuesday, June 13, 2000, the Court agrees with the Defendants that such a request is premature. The Court will set the matter for a status conference after it rules on the pending motions.

Order

Being fully advised in the premises, the Court hereby orders that:

1. Asarco's Motion for Partial Summary Judgment on Claims for National Resource Damages and Response Costs in Non-Asarco Drainages (Docket No. 722) is **GRANTED IN PART AND DENIED IN PART** consistent with this Order.

2. Asarco's Motion for Summary Judgment on Clean Water Act (Docket No. 727) is **DENIED**.

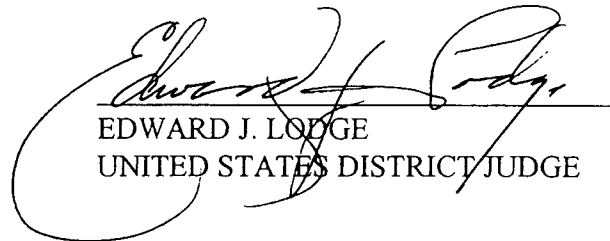
3. Asarco's Motion for Leave to File Summary of Disputed Facts (Docket No. 799) is **GRANTED**.

4. USA's Amended Motion to Amend Complaint (Docket No. 795) is **GRANTED** consistent with this Order. USA shall file an Amended Complaint which details the factual allegations to

support their claims for piercing the corporate veils of certain Defendants. The Amended Complaint shall be filed within fourteen (14) days of the date of this Order.

5. USA's Motion to Amend Complaint (Docket No. 780) is **MOOT** based upon the filing of the amended motion.

SO ORDERED this 15th day of June, 2000.



EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

U.S. COURTS
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CAMERON S. BURKE
CLERK IDAHO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

ASARCO INCORPORATED, et al.,

Defendants.

No. CV-96-0122-N-EJL ✓

No. CV-91-0342-N-EJL

DECLARATION OF J. CHRISTOPHER
PFAHL IN SUPPORT OF
DEFENDANT ASARCO
INCORPORATED'S MOTION FOR
PARTIAL SUMMARY JUDGMENT RE
CLAIM FOR NATURAL RESOURCE
DAMAGES AND RESPONSE COSTS
IN NON-ASARCO DRAINAGES

AND CONSOLIDATED CASE.

I, J. CHRISTOPHER PFAHL, hereby declare and state as follows:

1. I am currently Closed Plant Site Manager for ASARCO, Incorporated.¹ My office is located in Osburn, Idaho. I have been working for Asarco in the Coeur d'Alene

¹ For purposes of this declaration, "Asarco" refers to defendants ASARCO Incorporated, Government Gulch Mining Co., Inc., and Federal Mining and Smelting Co., Inc.

River Basin since 1977. I was Asarco's representative for its Rule 30(b)(6) depositions related to Asarco's mining operations in the Basin. In preparing for the depositions, I extensively reviewed Asarco files regarding its current and historic operations in the Basin.

Based upon this review and my personal knowledge of Asarco's operations, I attest that Asarco did not own or operate mining operations located in the following areas of the Coeur d'Alene Basin.

a) Mainstem of the South Fork of the Coeur d'Alene River (SFCDR) upstream of Mill Creek (at Mullan) and all the tributaries to that portion of the South Fork of the Coeur d'Alene River, including, but not limited to:

- Little North Fork
- Daisy Gulch
- Gentle Annie Gulch
- Deadman Gulch
- Willow Creek
- Gold Hunter Gulch
- Boulder Creek

b) Tributaries to the SFCDR, between Mullan and Silverton as follows:

- St. Joe Creek
- Grouse Gulch
- Ruddy Gulch
- Rock Creek
- Trowbridge Gulch
- Dexter Gulch
- Upper Reaches of Canyon Creek above Tiger Poorman Mine and Mill Sites
- Gorge Gulch
- Nine Mile Creek and its tributaries
- Watson Gulch
- Weir Gulch
- Placer Creek

c) Tributaries to SFCDR between Silverton and Elizabeth Park as follows:

Rosebud Gulch
Terror Gulch
Spring Gulch
Polaris Gulch
Prospect Gulch
Big Creek
Moon Creek
Gold Run Gulch
Montgomery Creek
Elk Creek
Jewell Gulch
Nukols Gulch

d) Tributaries to SFCDR between Elizabeth Park and Pinchurst as follows:

Ross Gulch
Italian Gulch
Upper Reaches of Milo Creek above the Last Chance Mine Site
Slaughterhouse Gulch
Lower Portal Gulch
Magnet Gulch
Caldwell Gulch
Sweeney Gulch
Bear Creek
Cook Creek
Pine Creek and all its tributaries

e) All tributaries (outside of the floodplain) to the mainstem of the Coeur d'Alene River, downstream (west) of the confluence of the North Fork and South Fork of the Coeur d'Alene River.

I, J. CHRISTOPHER PFAHL, declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 15th day of March, 2000.


J. CHRISTOPHER PFAHL

DECLARATION OF J. CHRISTOPHER
PFAHL - 3

LOIS J. SCHIFFER
Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

U.S. COURTS

TOM C. CLARK, II, Senior Counsel
THOMAS W. SWEGLE, Senior Lawyer
KATHRYN C. MACDONALD, Trial Attorney
Environmental Enforcement Section

APR 20

REC'D

MARC HAWS
Assistant United States Attorney
United States Attorneys Office
District of Idaho

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

ASARCO INCORPORATED, et. al.

Defendants.

and Consolidated Case.

No. 96-0122-N-EJL ✓
No. 91-0342-N-EJL

MEMORANDUM OF PLAINTIFF, UNITED STATES OF AMERICA, IN RESPONSE
TO DEFENDANT ASARCO'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON
CLAIMS FOR NATURAL RESOURCE DAMAGES AND RESPONSE COSTS IN NON-
ASARCO DRAINAGES

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INTRODUCTION

The United States files this memorandum in response to ASARCO's Motion for Partial Summary Judgment on Claims for Natural Resource Damages and Response Costs in Non-ASARCO Drainages (hereinafter "Motion for Summary Judgment as to Non-ASARCO Drainages"). In its Motion for Summary Judgment as to Non-ASARCO Drainages, defendant ASARCO Inc. ("ASARCO") seeks summary judgment as to sections of and tributaries to the South Fork of the Coeur d'Alene River ("South Fork"), and tributaries to the main stem of the Coeur d'Alene River ("Coeur d'Alene River"), on which ASARCO contends that it never owned or operated a mining-related facility from which releases of hazardous substances have occurred. In responding to this Motion, the United States does not contend that ASARCO is liable in sections of or tributaries to the South Fork, or tributaries to the Coeur d'Alene River, where ASARCO never owned or operated a "facility" as that term is defined in CERCLA, or where hazardous substances released from a facility for which ASARCO is liable have not come to be located.^{1/} Therefore, the United States does not oppose ASARCO's Motion as to many of the specific tributaries for which ASARCO seeks summary judgment. For the Court's convenience, in responding to the Motion for Summary Judgment as to Non-ASARCO Drainages, after first discussing an issue that relates to all of the tributaries, the United States will organize its

^{1/} See Memorandum of Plaintiff United States of America in Support of Its Motion for Partial Summary Judgment as to Liability of Defendant ASARCO filed March 20, 2000, at pp. 15-16 for the United States' legal discussion of what constitutes a "facility" under CERCLA. In particular, the United States notes that a "facility" includes every conceivable place where hazardous substances come to be located, 3550 Stevens Creek Assoc. v. Barclays Bank of California, 915 F.2d 1355, 1360 (9th Cir. 1990), and not just the mining-related facilities at which it released hazardous substances.

response according to ASARCO's grouping of river sections and tributaries as to which it seeks summary judgment in numbered paragraphs 1 through 5 on pages 5 and 6 of ASARCO's Memorandum in Support of the Motion.

FACTS

Pursuant to Local Rule 7.1(c)(2), the United States has attached hereto the Response of Plaintiff, United States of America, to Defendant ASARCO's Statement of Undisputed Facts in Support of Its Motion for Partial Summary Judgment on Claims for Natural Resource Damages and Response Costs in Non-ASARCO Drainages (hereinafter "US Resp. to SOF").

DISCUSSION

I. Summary Judgment Should Be Denied as to the Lower Sections of Tributaries to the South Fork and Coeur d'Alene River Within the Floodplain of those Rivers.

Each creek and drainage that is a tributary to the South Fork crosses over the South Fork's floodplain before the tributary meets the South Fork. US Resp. to SOF, at ¶ 1. The beds and banks of these lower sections of the tributaries to the South Fork, that is, the sections within the South Fork's floodplain, contain mining-related hazardous substances transported by South Fork river waters from historic mining operations upstream in the South Fork river basin. *Id.* Therefore, even if some tributaries to the South Fork may not be contaminated by releases of mining-related hazardous substances upstream on the tributaries, the beds and banks of the lower reaches of such tributaries are contaminated with hazardous substances where the tributaries are within the floodplain of the South Fork. *Id.* Releases of hazardous substances from ASARCO's mining operations began impacting the South Fork's floodplain at Mill Creek, as clearly implied in Paragraph 1, at page 5, of ASARCO's Memorandum in Support of the Motion. Accordingly,

summary judgment should be denied as to the lower sections of the tributaries listed in Paragraphs 2-4, at pages 5-6, of ASARCO's Memorandum in Support of the Motion, that is, the sections of these listed tributaries within the floodplains of the South Fork .

Likewise, the beds and banks of the lower sections of tributaries to the Coeur d'Alene River, that is the sections within the Coeur d'Alene River's floodplain, contain mining-related hazardous substances transported by Coeur d'Alene River waters. US Resp. to SOF, at ¶ 2. Therefore, even if tributaries to the Coeur d'Alene River may not be contaminated by releases of mining-related hazardous substances upstream on the tributaries, the beds and banks of the lower reaches of such tributaries are contaminated with hazardous substances where the tributaries are within the floodplain of the Coeur d'Alene River. *Id.* Accordingly, summary judgment should be denied as to the lower sections of the tributaries to the Coeur d'Alene River listed in Paragraph 5 of ASARCO's Memorandum in Support of the Motion, that is, the sections of these listed tributaries within the floodplain of the Coeur d'Alene River.²

² In fact, ASARCO seems to concede this point and does not seek summary judgment as to sections of the tributaries to the Coeur d'Alene River within the floodplain, because in its Memorandum in Support of its Motion, ASARCO states that it seeks summary judgment as to "[a]ll tributaries (outside of the floodplain) to the mainstem of the Coeur d'Alene River" ASARCO Memorandum in Support of Motion for Summary Judgment as to Non-ASARCO Drainages, at p. 6, ¶ 5 (emphasis added).

II **United States' Response to Particular Stretches and Tributaries for Which ASARCO Seeks Summary Judgment.**

A. River Section and Tributaries Listed in Paragraph 1 of ASARCO's Memorandum

The United States does not oppose ASARCO's motion for summary judgment as to its liability for the section of the South Fork upstream of Mill Creek in Mullan and the tributaries to the South Fork described in Paragraph 1, at page 5, of ASARCO's Memorandum in Support of Motion for Summary Judgment as to Non-ASARCO Drainages.

B. Tributaries to South Fork Listed in Paragraph 2 of ASARCO's Memorandum

The United States does not oppose ASARCO moving for summary judgment as to its liability for the drainages as set forth in Paragraph 2, at pages 5-6, of ASARCO's Memorandum in Support of Motion for Summary Judgment as to Non-ASARCO Drainages, except as to the Grouse Gulch. At least three waste rock dumps associated with Federal Mining Company and later ASARCO's mining operations on the Page Properties are located along the Grouse Gulch.³ US Resp. to SOF, at ¶ 24. Runoff from rain or snow melt runs through these waste rock dumps, and then into Grouse Creek. *Id.* As the Defendants' expert, Steven Werner, has conceded, waste rock is a source of metals releases to the environment through erosion during spring runoff and other high-flow events and leaching as a result of seasonal or continual infiltration or interaction with groundwater. *Id.*; Statement of Material Facts Not Genuinely Disputed in Support of Plaintiff, United States of America's Motion for Partial Summary Judgment Against Defendants Coeur d'Alene Mines Corporation and Callahan Mining Corporation (hereafter "US SOF as to

³ASARCO has assumed the liabilities of Federal Mining Company. See Memorandum of Plaintiff, United States of America, in Support of its Motion for Partial Summary Judgment as to Liability of Defendant ASARCO, at pp.11-12.

Coeur"), at ¶ 11; see also id. at ¶ 12. Therefore, triable issues of material fact exist as to ASARCO's liability for hazardous substances on Grouse Creek, and ASARCO's motion for summary judgment as to its liability on Grouse Creek should be denied.⁴

C. Tributaries to South Fork Listed in Paragraph 3 of ASARCO's Memorandum

The United States does not oppose ASARCO's motion for summary judgment as to its liability for the tributaries to the South Fork as set forth in Paragraph 3, at page 6, of ASARCO's Memorandum in Support of Motion for Summary Judgment as to Non-ASARCO Drainages.

D. Tributaries to South Fork Listed in Paragraph 4 of ASARCO's Memorandum

The United States does not oppose ASARCO's motion for summary judgment as to its liability for the tributaries to the South Fork described in Paragraph 4, at page 6, of ASARCO's Memorandum in Support of Motion for Summary Judgment as to Non-ASARCO Drainages, except as to Silver Creek and Little Pine Creek, which are tributaries to Pine Creek, and the stretch of Pine Creek beginning at the point where Little Pine Creek enters Pine Creek and extending downstream to Pine Creek's confluence with the South Fork.

Both the Page Mine and Page Mine Waste Rock Dump are located along Silver Creek.

⁴In its Memorandum in Support of the Motion for Summary Judgment, ASARCO refers to the Grouse Creek as a tributary to the South Fork. See ¶ 2, at p.5. However, testimony by ASARCO's engineer, Christopher Pfhal, states that the Grouse Creek drains into the East Page Swamp, which, in turn, flows into the West Page Swamp via a channel connecting these swamp areas, and then from there flows into Pine Creek via a culvert, and then ultimately from there into the South Fork. See US Resp. to SOF, at ¶ 16. To the extent that ASARCO's present Motion is interpreted as moving for summary judgment for its liability at East Page Swamp, triable issues of material fact exist as to ASARCO's liability for hazardous substances from East Page Swamp, and thus ASARCO's motion for summary judgment as to its liability on East Page Swamp should be denied. Id. at ¶¶ 16, 24. Because ASARCO's motion seeks summary judgment only as to tributaries, the United States assumes ASARCO's motion does not apply to swamps or other waterbodies.

US Resp. to SOF, at ¶¶ 3, 22-23. The Page Mine was owned by Federal from 1913 until 1953, and from 1953 until the present by ASARCO. Id. at ¶ 5. From 1925 or 1926 through 1969, Federal, and then ASARCO (after 1953) conducted exploration activities at and extracted ore from the Page Mine. Id. at ¶ 6. The Page Mine Dump was located near the main shaft to the Page Mine, and was first created when the shaft was first sunk, and then subsequently enlarged by Federal as the shaft was extended deeper into the ground. Id. at ¶ 22. In fact, the Page mine plant was built on top of the Page Mine Dump. Id. at ¶ 23. Silver Creek was conveyed through a culvert underneath the Page Mine Dump and re-emerged at the toe of the Page Mine Dump. Id. During a flood event in 1974, the culvert underneath the Page Mine Dump was blocked, forcing the Silver Creek waters to flow over the Dump. Id. Silver Creek waters and runoff from rain percolated through the waste rock of Page Mine Dump, which contained aluminum, silicon, lead, and zinc, and then discharged to Silver Creek. Id. Silver Creek flows into Humboldt Gulch, and ultimately into Pine Creek. Id.

The Page Mill is also located on Silver Creek. Id. at ¶ 4. From 1926 until 1970, Federal, and after 1953 ASARCO, owned the Page Mill and processed ore at the Mill. Id. at ¶¶ 8-9. While the tailings generated by the processing of ore at the Page Mill were deposited directly into a swamp area which later became the Page Tailings Impoundment, the decant water containing metals from the tailings in the Page Tailing Impoundment was piped into the West Page Swamp, which drained into Pine Creek. Id. at ¶¶ 15, 17, 18. Therefore, triable issues of material fact exist as to ASARCO's liability for Silver Creek, a tributary to Pine Creek, and West Page Swamp, water from which flows into Pine Creek, and ASARCO's motion for summary judgment as to its liability for Silver Creek and West Page Swamp should be denied.

Triable issues of material fact also exist as to ASARCO's liability for Little Pine Creek, another tributary to Pine Creek. Id. at ¶ 25. Another waste rock dump associated with the Page Properties is located on property owned by ASARCO on Little Pine Creek. Id. at ¶¶ 26, 28. The toe of this waste rock dump extends into Little Pine Creek, with waste rock in direct contact with Little Pine Creek. Id. at ¶ 28. As the Defendants' expert, Steven Werner, has conceded, waste rock is a source of metals releases to the environment through erosion during spring runoff and other high-flow events and leaching as a result of seasonal or continual infiltration or interaction with groundwater. Id. Little Pine Creek flows into Pine Creek, and ultimately the South Fork. Id. at ¶ 25. This waste rock dump is situated between Little Pine Creek and the entrance of a 780-foot Common Tunnel, which Federal drilled in order to obtain patented Page mining claims. Id. at ¶¶ 27-28. In fact, this tunnel has been observed to discharge water at a rate of approximately 10 to 20 gallons per minute. Sampling of this water seeping from the tunnel showed the presence of elevated dissolved solids as compared to Pine Creek background samples. Id. at ¶ 29. This water discharging from the tunnel was observed to flow downhill beside the waste rock dump until right before Little Pine Creek, at which point the water went below the surface of the waste rock dump. Id. Because the waste rock dump extending into Little Pine Creek and the tunnel discharging mine drainage are located on property currently owned by ASARCO, triable issues of material fact exist as to ASARCO's liability for Little Pine Creek, a tributary to Pine Creek, and ASARCO's motion for summary judgment should be denied as to Little Pine Creek.

Hazardous substances that enter the waters of Little Pine Creek are by necessity carried into Pine Creek at the confluence of the two creeks. Therefore, as the stretch of Pine Creek

extending from its confluence with Little Pine Creek to Pine Creek's confluence with the South Fork is impacted by such hazardous substances, triable issues of fact exist as to this stretch of Pine Creek, and Asarco's motion for summary judgment should be denied as to it.

E. Tributaries to the Main Stem of the Coeur d'Alene River Listed in Paragraph 5 of ASARCO's Memorandum

The United States does not oppose ASARCO's motion for summary judgment as to its liability for all tributaries to the main stem of the Coeur d'Alene River listed in Paragraph 5, at page 6, of ASARCO's Memorandum in Support of Motion for Summary Judgment as to Non-ASARCO Drainages. However, the United States opposes summary judgment as to the sections of the listed tributaries within the Coeur d'Alene River's floodplain for the reasons stated in Section I herein. Triable issues of material fact clearly exist as to those sections of the tributaries within the Coeur d'Alene River's floodplain. Furthermore, in agreeing that ASARCO is not liable for the sections of the listed tributaries to the Coeur d'Alene River outside of the River's floodplain, the United States wishes to make clear that summary judgment is not appropriate as to any other area of the floodplain of the Coeur d'Alene River, or the lateral lakes adjacent to the Coeur d'Alene River, or Lake Coeur d'Alene.

As explained in detail in the US SOF as to Coeur, metal-contaminated tailings from upstream Basin mines and mills, including those owned and/or operated by ASARCO and other defendants, that washed downstream of the confluence of the North and South Forks, have become commingled in sediments and alluvium in flood plains and deposited on the beds and banks of rivers and lateral lakes of the lower Basin as well as Lake Coeur d'Alene. US SOF as to Coeur, at ¶¶ 30-39. In fact, lateral lakes such as Black Lake, Anderson Lake, and Swan Lake

have lead concentrations in sediments ranging from 5,000 ppm to 7,500 ppm. US SJ SOF as to Coeur, at ¶ 37. As a result, as explained in the Memorandum of Plaintiff United States of America in Support of its Motion for Partial Summary Judgment as to Liability of Defendant ASARCO, at pages 27-29, 31-35, ASARCO and the other defendants should be held jointly and severally liable for the costs of cleaning up hazardous substances in the lateral lakes and Lake Coeur d'Alene as well as all other areas of the Basin where ASARCO's wastes have commingled with the wastes released by other defendants.

CONCLUSION

Except as to the tributaries and areas as to which the United States has raised issues of material fact regarding ASARCO's liability in this memorandum, the United States does not oppose ASARCO's Motion for Partial Summary Judgment on Claims for Natural Resource Damages and Response Costs in Non-ASARCO Drainages.

Respectfully Submitted,

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Dated: April 19, 2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of April 2000, I caused to be served a true and correct copy of the U. S.' Memorandum In Response To ASARCO's Motion for Partial Summary Judgment On Claims For Natural Resource Damages and Response Costs in Non-ASARCO Drainages and U.S.'s Response to ARSARCO's Statement of Undisputed Facts, including Declarations of David Fortier, Charles Freise, and Stephen Box.

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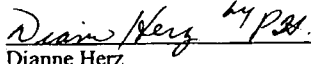

Dianne Herz
Paralegal Specialist

EXHIBIT 10

**SILVER VALLEY NATURAL RESOURCE
TRUSTEES
ACTIVITIES AND EXPENDITURES
1994 – 1999**

THE TRUST FUND RESOURCE

Balance: 1/94

Estimated PRP's Contribution

Estimated Interest Income

TOTAL

\$5,500,000

\$ 735,000

\$ 220,000

\$6,455,000

TRUST FUND EXPENDITURE PLAN 1994 -2000

<u>Year</u>	<u>Project</u>	<u>Estimated cost</u>
1994	Tailings Isolation Project at Elizabeth Park on the SFCDR	\$ 300,000
1994	Tailings Removal and Restoration of Creek Channel	\$ 10,000
	East Fork Nine Mile Cooperative Project: Matching Funds	\$ 500,000
	Nine Mile Creek below Day Rock	
1994	Canyon Creek Tailings removal Pre-design	\$ 50,000
1994	Tailings Removal and beach replacement at Elk Creek Pond	\$ 75,000
1994	Milo Creek Diversion Planning	\$ 10,000
1994	Osburn Ground Water Characterization	\$ 25,000
1995	Removal and channel restoration near Formosa Mine Site in Canyon Creek Drainage	\$ 500,000
1995	Milo Creek Diversion Planning	\$ 10,000
1995	Osburn Ground Water Characterization	\$ 25,000
1995 - 1996	Tailing removal and channel restoration at Canyon Creek flats near Woodland Park	\$2,000,000
1996 - 1997	Clean water diversion of upper Milo Creek above mine workings	\$ 530,000
1996 - 1997	Osburn Flats tailings removal or other activities to reduce ground water loading	\$1,000,000
1997 - 1998	Osburn Flood Plain restoration and revegetation	\$ 200,000
1997 - 1998	Big Creek Flood Plain restoration and revegetation	\$ 200,000
1998 - 1999	Discrete tailings removal along SFCDR Flood Plain, and generic rehabilitation and revegetation	<u>\$ 440,000</u>
	Subtotal Remedial Work	\$5,875,000
		<u>\$ 580,000</u>
1994 - 1999	Administrative Support	\$6,455,000
	TOTAL	

BUNKER HILL
REMEDIAL DESIGN and REMEDIAL ACTION
AREA I
STATEMENT OF WORK

1.0 INTRODUCTION, DEFINITIONS, AND GENERAL PROVISIONS

1.1 Introduction

This Statement of Work ("SOW") details the on-site activities to be undertaken by the Settling Defendants in compliance with the requirements of this Consent Decree. The Work shall be consistent with the decisions set forth in the Bunker Hill 1992 Record of Decision ("1992 ROD") and the 1991 Residential Soils ROD ("1991 ROD") attached as Appendix A to the Consent Decree and performed pursuant to the Consent Decree.

The Work shall be structured to allow the most expeditious implementation of actions in a coordinated sequence that integrates remediation goals and minimizes short-term impacts and disruptions to the affected communities. The Work shall be organized in a series of Elements, described below, having individual Objectives and Performance Standards that recognize the various media and sub-area conditions at the site. The Elements of Work may be integrated, as appropriate, during remedial action to provide an efficient annual comprehensive schedule. The elements are further described in Draft or Final Remedial Design Reports (RDRs) which are attached to the Consent Decree. Only those portions of the individual elements which are scheduled to occur within Area I, as delineated on the Bunker Hill Superfund Site Allocation Map, attached as Attachment C to the Consent Decree (Allocation Map), are included in the Work.

In addition to the Elements of Work, an Institutional Controls Program (ICP) will be implemented as part of the remedy. The ICP-related responsibilities of the Settling Defendants are set forth in Attachment D of the Consent Decree. The ICP serves to maintain the long-term effectiveness of those remedial actions addressing the communities.

1.2 Definitions

Terms used in this SOW are as defined below or, as to others, by this Consent Decree, CERCLA and the NCP.

1.2.1 "Clean Soil" shall contain mean concentrations less than 100 ppm lead, 100 ppm arsenic and 5 ppm cadmium. No single sample shall exceed 150 ppm lead.

1.2.2 "High Risk Yards" means:

- Homes where children six years of age and under are in residence.
- Homes with pregnant women in residence.
- Licensed Day Care Centers.

- Homes where the most recent blood lead survey indicates that children in residence have a blood lead level equal to or greater than 10 $\mu\text{g/dl}$ and the Panhandle Health District (PHD) has determined that the yard soil exposure is a significant exposure pathway.

1.2.3 "Reasonably Segregable Areas" are defined as follows and include all remedial actions for each portion of a SOW Element of Work to be conducted within that area.

- The city of Pinehurst (including the Dalton Subdivision)
- The city of Smelterville (including 3 parcels of Asarco owned commercial property commonly known as the Old Lions Club Lease, Linfor Lumber, and Theater Pit).
- The city of Wardner
- The portion of the city of Kellogg located on the northern side of I-90
- The portion of the city of Kellogg located on the southern side of I-90
- The unincorporated community of Page
- The unincorporated residential areas of Elizabeth Park, Ross Ranch and Montgomery Gulch
- Page Pond

1.2.4 "Contaminated Soils" means those contaminated soils which are removed during remediation of Area I for disposal at the Page Pond Repository or other EPA-approved disposal site.

1.2.5 "Sensitive Populations" include children between 0 and 12 years of age and pregnant women.

1.3 General Provisions

1.3.1 The Work activities associated with this SOW are final remedial actions. Remedial actions outlined for Area I in this Statement of Work shall meet Performance Standards.

1.3.2 The Settling Defendants will begin performance of the Work as described in Section 5.0 of this document. Settling Defendants will not, however, be required to commence construction or sampling until this Consent Decree has been entered by the Court or unless such construction or sampling is otherwise ordered by the Court.

1.3.3 Each Element of Work, or a portion of an Element of Work shall be integrated and coordinated in a manner consistent with all other Elements of Work under this Consent Decree, and with

other operations and/or tasks, including, but not limited to, emergency response activities.

- 1.3.4 Any repairs required to community infrastructure, such as roads and utilities, due to the implementation of the Work, shall be performed.
- 1.3.5 Repairs to private property shall be as specified in the Draft Residential Yards RDR.
- 1.3.6 Whenever Settling Defendants are obligated to perform an activity under this SOW, they may perform the activity themselves or engage a contractor (or contractors) accepted by EPA, unless other arrangements are mutually agreed upon, in fulfillment of their obligation.
- 1.3.7 During remedial construction activities, dust control measures shall be implemented to control the transport of contaminated material. Dust control activities shall include, but not be limited to, engineering and construction practices, the use of water to wet down areas or polymeric, chemical or physical surface sealers for temporary dust control.
- 1.3.8 Appropriate controls shall be used in Area I to prevent exposures during performance of the Work. Access controls shall include, but not be limited to, fencing and signs. Access control shall be maintained in all areas where it currently exists.
- 1.3.9 Appropriate controls shall also be applied in Area I, as necessary, to restrict access to potential source areas, to control transport of contaminants and to control exposures to contaminants of concern during construction activities.
- 1.3.10 The release of contaminants during remedial construction activities shall also be controlled. This shall include, but not be limited to, the management of runoff to minimize sediment transport to surface water. Storm water management during remedial implementation shall be consistent with all Federal, State and local requirements.
- 1.3.11 With respect to the Page Pond Element of Work, Best Management Practices shall be employed during remedial actions and the practice of not scheduling Work activities during high flow conditions shall be continued.
- 1.3.12 The objective of routine site maintenance is to ensure that facilities and control measures at the Site continue to be effective and achieve Performance Standards over the long term.
- 1.3.13 Work performed by Settling Defendants for the Page Pond Element of Work shall minimize operation and maintenance (O&M) requirements. A comprehensive post-closure O&M program will be defined during Remedial Action through preparation of a post-closure O&M Plan for the Page Pond Element of Work. It is the

expectation of the Parties that the ICP will accomplish the O&M requirements for the other portions of Area I.

- 1.3.14 In the event of any action or occurrence arising in connection with the performance of the Area I Work which causes or threatens a release of Waste Material at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, the Settling Defendants shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the Project Coordinators for EPA and the State, or, if they are unavailable, their alternates. Where such a threat is identified, the Emergency Response provisions of the Consent Decree will apply. Where the EPA or State of Idaho project coordinator or designee makes a preliminary determination that substantial emergency property damage is threatened or has occurred due to remediation activities, the Settling Defendants will take action as required in the Draft Residential Yards RDR.
- 1.3.15 The Settling Defendants shall respond to conditions related to the Work identified by EPA as posing an immediate hazard within 24 hours of notice for the Page Pond Element of Work unless otherwise provided in the Consent Decree.

2.0 DESCRIPTION OF WORK TO BE PERFORMED, PERFORMANCE STANDARDS AND OBJECTIVES

This Section sets forth the Elements and Components of Work to be performed pursuant to this Consent Decree and states the Objectives and Performance Standards for the Work. These elements address that portion of the Work to be conducted by the Settling Defendants, within the Area I boundaries presented in the Allocation Map. The following Elements of Work are intended to provide a synopsis of the pertinent remedial actions that are explained in additional detail in the 1991 ROD and the 1992 ROD. The Draft or Final Remedial Design Reports, Attachments E through I to the Consent Decree, describe the Work in more detail.

A primary objective for remediation of the Site is the reduction of blood leads in the population; specifically, reduction in child blood lead concentrations so that 95% or more of the children tested in the blood lead survey have blood lead concentrations of less than 10 $\mu\text{g}/\text{dL}$ and less than one percent have blood lead concentrations greater than 15 $\mu\text{g}/\text{dL}$. This objective as well as related objectives for environmental transport of site contaminants shall be addressed through a series of remedial actions for various subareas of the Site. The remedial actions described below, as well as those to be conducted by others, comprise a site-wide comprehensive remedy consisting of a combination of treatment, containment, engineering and institutional controls.

2.1 Page Pond Element of Work

The Page Pond Element of Work is described in the Draft Page Pond RDR. The Page Pond Element of Work includes the following two Components:

- Page Pond Component
- Humboldt and Grouse Creeks Component

2.1.1 Page Pond Component

The objective of the Work is to limit releases from this source by consolidating, capping and revegetating.

2.1.1.1 Performance Standards for this Component of Work are as follows:

2.1.1.1.1 Portions of the exposed tailings located in shallow areas such as the West beach of the West Page Swamp area and the areas surrounding the decant lines, shall be removed, to the extent technically feasible, and subsequently placed on the Page Pond benches for use as a sub-base for a vegetated cover. To the extent that tailings in these and other shallow areas cannot be removed, the areas shall be covered with a minimum of 12 inches of clean soil and revegetated. All other areas shall be submerged under

approximately 2 feet of water. To the maximum extent practicable, these water levels shall be maintained throughout the year. The amount of material to be removed from shallow areas such as the West beach of the West Page Swamp and the areas surrounding the decant lines shall be determined during remedial design and shall consider the feasibility of effectively removing and relocating tailings deposits, including tailings moisture content and texture, current vegetated status, surficial soil contaminant concentrations, water levels, and habitat. The design shall be subject to EPA approval.

- 2.1.1.1.2 Page Pond benches shall be covered with a minimum of six inches of Contaminated Soils, regraded to promote runoff, and revegetated.
- 2.1.1.1.3 Page Pond impoundment dikes shall be regraded to provide slope stability and then revegetated after placement of a minimum of six inches of Clean Soil. Contaminated Soil may be used providing access is adequately controlled, as determined by EPA.
- 2.1.1.1.4 Adequate controls shall be provided to prevent public access to the remedial actions performed at Page Pond.
- 2.1.1.1.5 Wetlands associated with the Page Pond areas shall be monitored for sediment and water quality. Water quality sampling will occur twice annually at two inflow and two outflow points for the year prior to and the five years following remediation. Sediment sampling will be consistent with the 1993 transect sampling program and will occur immediately after remediation and again at five years after remediation. Water and sediment sampling requirements are presented in the Draft Page Pond RDR.
- 2.1.1.1.6 Biomonitoring shall be conducted at the Page Pond Swamps in the year prior to remediation and for the next five years after remediation. The monitoring shall consist of bird surveys and mammal tissue sampling. Biomonitoring requirements, including provisions for long-term monitoring, are presented in the Draft Page Pond RDR.

2.1.2 Humboldt and Grouse Creeks Component

The objective of this Component is to limit the contamination of these surface streams by preventing contact with Page Pond area tailings. Only those portions of Humboldt and Grouse Creeks within Area I boundaries, as delineated by the Allocation Map, are addressed by this Component.

2.1.2.1 Performance Standards for this Component of Work are as follows:

2.1.2.1.1 Humboldt and Grouse Creeks shall be isolated, to the degree practicable, from contact with tailings accumulations by the use of diversions and stream channel modifications in the existing channels north and south of the Page Pond Impoundment. Outlet control weirs shall be constructed to maintain consistent water levels in the East and West Page Swamps to the degree practicable.

2.1.2.1.2 Final configuration of any channel modifications shall take into account habitat considerations. The design shall be subject to EPA approval.

2.2 Rights-of-Way (ROW) Element of Work

The Rights-of-Way Element of Work is described in the Final ROW RDR. Only ROW within Area I boundaries as delineated by the Allocation Map are addressed by this Element of Work.

2.2.1 The objectives of the Work are to control direct contact risk and migration of contaminants originating from ROW through air and water.

2.2.1.1 Performance Standards for this Element of Work are as follows:

2.2.1.1.1 Rights-of-Way include state, county, local and private roads.

2.2.1.1.2 All ROW with lead concentrations of 1,000 ppm or greater in the top six or twelve inches of soil shall receive, upon EPA approval, one or more of the following treatments: revegetation, barrier placement, removal/replacement and/or access control, dependent upon geographic location and current land use. Barrier type and thickness will also be determined based on geographic location and current land use.

- 2.2.1.1.3 ROW adjacent to residential properties will be sampled at the 0- to 1-, 1- to 6-, 6- to 12-, and 12- to 18-inch intervals. ROW located within Area I, as described by the Site Allocation Map, but not adjacent to residential properties will be sampled at the 0- to 1-, 1- to 6-, and 6- to 12-inch intervals. Sample collection and analysis will be conducted consistent with Appendix B of the Draft Residential Yards RDR.
- 2.2.1.1.4 ROW where access is restricted and where vegetative cover is 85% or greater require no additional remedial action. If access is restricted and vegetative cover is less than 85%, direct revegetation will occur.
- 2.2.1.1.5 Where barriers are utilized, the barriers shall have sufficient durability to minimize future operation and maintenance requirements.
- 2.2.1.1.6 Within residential areas, ROW adjacent to residential properties shall be treated utilizing methods presented in the Draft Residential Yards RDR. These methods will result in a minimum 12-inch protective barrier over soils with lead concentrations of 1,000 ppm or more.
- 2.2.1.1.7 ROW in non-residential settings shall be remediated in a manner consistent with the adjacent properties and usage. These properties, if not access-restricted, shall receive a minimum of a 6-inch protective barrier.
- 2.2.1.1.8 Excavated soils shall be consolidated in the Page Pond Repository or other EPA-approved area.
- 2.2.1.1.9 The exact nature of each ROW remediation shall be determined on a case-by-case basis through the process outlined in the Draft ROW RDR.

2.3 Commercial Properties Element of Work

The Commercial Properties Element of Work is described in the Final Commercial Properties RDR. Only commercial properties within Area I boundaries as delineated by the Allocation Map are addressed by this Element of Work.

2.3.1 The objectives of the Work are to control direct contact risk and the migration of contaminants originating from commercial properties.

2.3.1.1 Performance Standards for this Element of Work are as follows:

2.3.1.1.1 For commercial properties located within Area I, as defined by the Site Allocation Map, surface soils with a lead concentration of 1,000 ppm or greater in the top six or twelve inches must receive a protective barrier. Sampling depth and resultant barrier thickness will be dependent on type of land use. Barriers shall consist of a minimum of six inches of clean soils and revegetation, six inches of gravel, or a paved surface consistent with land use.

2.3.1.1.2 Barriers installed for commercial properties used predominantly by sensitive populations, or commercial properties with unrestricted access from adjacent residential property, shall meet the requirements of the Draft Residential Yards RDR, or be consistent with the setting and acceptable to EPA.

2.3.1.1.3 Commercial properties with lead concentrations of 1,000 ppm or greater in the 12- to 18-inch interval used predominantly by sensitive populations or with unrestricted access from adjacent residential properties and with a high probability of disturbance shall receive a visual marker prior to placement of the 12-inch barrier.

2.3.1.1.4 Commercial properties not predominantly used by sensitive populations or those with restricted access from adjacent residential properties will be sampled at the 0- to 1-, 1- to 6-, and 6- to 12-inch intervals for determination of the lead concentration. All other commercial properties within Area I shall be sampled consistent with the Final Residential Yards RDR. Sample collection and analysis will be conducted consistent with Appendix B of the Draft Residential Yards RDR.

2.3.1.1.5 Excavated soils shall be consolidated within the Page Pond Repository or other EPA-approved areas.

2.3.1.1.6 Remediation of the Kellogg High School practice field, identified separately on the Allocation Map, shall include soil and sod removal and replacement of concentrations exceeding 1,000 ppm lead, up to a maximum removal depth of 6 inches. Removal depths will be based upon the results of the sampling program defined specifically for the practice fields in the Draft Commercial Properties RDR.

2.3.1.1.7 The exact nature of each commercial property remediation shall be determined on a case-by-case basis through the process outlined in the Draft Commercial Properties RDR.

2.4 Water Well Closure Element of Work

The Water Well Closure Element of Work is described in the Final Water Well Closure RDR. Only Water Well Closure within Area I boundaries as delineated by the Allocation Map is addressed in this Element of Work.

2.4.1 The objective of the Work is to assure adequate supplies of water and to minimize exposure to on-site surface and ground waters by reducing the potential for human ingestion and/or contact with contaminated ground water; reducing the potential for ground-water contamination from surface sources; and reducing the number of potential vertical conduits for contaminant migration (ground water).

2.4.1.1 Performance Standards for this Element of Work are as follows:

2.4.1.1.1 All ground-water wells within Area I that are in the main valley aquifer, either upper zone, lower zone, or other contaminated wells (exceeding federally promulgated drinking water standards for total arsenic, cadmium, lead, and zinc) within Area I shall be closed or abandoned according to the Final Water Well Closure RDR and State of Idaho requirements (Idaho Department of Water Resources, 1989).

2.4.1.1.2 Residences in Area I serviced by a well selected for closure, which are not already serviced by a municipal water system, will be attached to the system.

2.5 Institutional Controls Program (ICP)

The Settling Defendants' obligations are described in Attachment D of the Consent Decree.

2.6 Residential Yards Element of Work

The Residential Yards Element of Work is defined in the Final Residential Yards RDR.

2.6.1 The objective of the Work is to control direct contact risk by creating average soil lead concentrations in each Reasonably Segregable Area that are protective of public health, and to control contaminant migration through air and water.

2.6.1.1 Performance Standards for this Element of Work are as follows:

2.6.1.1.1 All residential properties shall be sampled at the 0- to 1-, 1- to 6-, 6- to 12- and 12- to 18-inch intervals for determination of the 1,000 ppm lead threshold concentration. Sampling and analysis shall be conducted according to Appendix B of the Final Residential Yards RDR.

2.6.1.1.2 Soil samples were collected from a geographic distribution of residential properties in the Bauman Subdivision (as delineated on the Allocation Map). Analysis results from the properties sampled were below the 1,000 ppm action level. Therefore, yards in Bauman Subdivision will not require sampling or remediation.

2.6.1.1.3 Based on the results of the yard soil sampling, for those residential yards that exceed the 1,000 ppm lead action level, the extent of remediation will be determined as follows:

Extent of Remediation (2.6.1.1.3)

If Interval Equals or Exceeds Action Level		If Interval Less than Action Level		Remediation Depth
0 - 1"	AND	1 - 6", 6 - 12"	THEN	6"
1 - 6"		0 - 1", 6 - 12"		6"
6 - 12"		0 - 1", 1 - 6"		12"
12 - 18"		0 - 1", 1 - 6", 6 - 12"		NO REMEDIATION
0 - 1", 1 - 6"		6 - 12"		6"
0 - 1", 6 - 12"		1 - 6"		12"
1 - 6", 6 - 12"		0 - 1"		12"
NONE		0 - 1", 1 - 6", 6 - 12"		NO REMEDIATION

- 2.6.1.1.4 All produce garden areas in remediated yards will receive 24 inches of clean soil. A maximum of 11 cubic yards of clean soil for produce gardens will be delivered to residents whose yards do not require remediation. The soil will be made available on a Reasonably Segregable Area basis during the period from initiation construction activities within that Reasonably Segregable Area through certification. Procedures for residents requesting clean soil are presented in the Final Residential Yards RDR.
- 2.6.1.1.5 The exact nature of each yard remediation shall be determined on a case-by-case basis through the process outlined in the Final Residential Yards RDR.
- 2.6.1.1.6 In all 12-inch removals, if the 12- to 18-inch sample exceeds 1,000 ppm lead, a visible marker, such as an erosion control fabric, shall be placed prior to backfilling with clean soil.
- 2.6.1.1.7 After replacement with clean fill, yards shall be revegetated with sod. Improved contiguous hillside areas not currently serving as lawns shall be revegetated with native grasses.

- 2.6.1.1.8 Removed Contaminated Soils shall be disposed of at the Page Pond Repository or other EPA-approved area.
- 2.6.1.1.9 Remediated areas where EPA determines that revegetation is not necessary may receive clean gravel instead of soil.
- 2.6.1.1.10 Remediation of residential areas shall occur as scheduled on an annual basis. Upon completion of a Reasonably Segregable Area the average residential soil lead concentration shall be calculated following the procedure described in the Final Residential Yards RDR. If the average is 350 ppm lead, or greater, additional yards shall be remediated until the mean for the Reasonably Segregable Area is calculated to be below the 350 ppm criterion.

3.0 DESCRIPTION OF PLANS AND REPORTS

The following list, which identifies plans and reports which may be submitted during the RD/RA for the Work, reflects the current status of the project and unique aspects of the Bunker Hill Site. Considerable progress has already been made on the RD process. A series of Draft or Final Remedial Design Reports (RDRs), which address in detail the remediation requirements set forth in this Statement of Work are attached to the Consent Decree. Because of the diverse nature of the RDRs, each document individually addresses many of the Components and information requirements set forth in RD/RA guidance. In addition, specific planning and reporting requirements have been developed which correspond to the RDRs and further information to be generated in the RD/RA Process.

This Section is intended to provide a framework for developing plans and reports for the Work, and is not intended to be a prescriptive explanation of their content. Other information and requirements may be prescribed by EPA or the State through the review of the deliverables and other documents prepared by the Settling Defendants under this Consent Decree. Unless otherwise specified, the description is not meant to distinguish between draft and final versions of the documents.

3.1 Listing of Plans and Reports

The following is a list of the plans and reports described in this Section. Upon EPA's request any of these may be submitted in electronic form. This Section then sets forth a description of the types of information that should be included in the listed plans and reports.

- General Project Management
 - Project Management Monthly Reports
 - Technical Memoranda
- Remedial Design
 - Draft Remedial Design Reports
 - Final Remedial Design Reports
- Remedial Action
 - Remedial Action Work Plans
 - Health and Safety Plan
 - Construction Completion Reports
 - Completion of Remedial Action Certification Reports
 - Completion of the Work Reports

- Page Pond Post-Closure Operations and Maintenance (O&M) Plan
- Page Pond Annual Monitoring Report

3.2 General Project Management

3.2.1 Project Management Monthly Reports

The Project Management Monthly Reports shall be a consolidated status report on all Work. The Reports shall be divided into separate sections providing the status of the individual Elements and Components of Work under this SOW. The Reports shall include, but are not limited to, the following basic information:

- Introduction, including the purpose and general description of the Work currently being conducted.
- Activities/tasks undertaken during the reporting period, and expected to be undertaken during the next reporting period.
- Deliverables and milestones completed during the reporting period, and expected to be completed during the next reporting period.
- Identification of issues and actions that have been or are being taken to resolve the issues.
- Status of the overall project schedules and any proposed schedule changes.

3.2.2 Technical Memoranda

The Technical Memoranda are the mechanism for requesting modification of plans, designs, and schedules. Technical memoranda are not required for non-material field changes that have been approved by EPA. In the event that Settling Defendants determine that modification of an approved plan, design, or schedule is necessary, Settling Defendants shall submit a written request for the modification to the EPA Project Coordinator which includes, but is not limited to, the following information:

- General description of and purpose for the modification.
- Justification, including any calculations, for the modification.
- Actions to be taken to implement the modification, including any actions related to subsidiary documents, milestone events, or activities affected by the modification.
- Recommendations.

3.3 Remedial Design

3.3.1 Draft Remedial Design Reports

Draft Remedial Design Reports (Draft RDRs) have been prepared for each Element of Work to further define the scope of the Remedial Actions required by the Records of Decision (RODs) for the Bunker Hill Superfund Site issued in August of 1991, and September of 1992. The Draft RDRs have been finalized for the Residential Yards, ROW, Water Well Closure, and Commercial Properties Elements of Work. The Draft Page Pond RDR provides the approved conceptual design for the Page Pond Element of Work and presents the objectives and Performance Standards to be applied and design considerations suggested by recent field investigations. The Final Page Pond RDR will be based upon the approved conceptual designs presented in the Draft RDR.

3.3.2 Final Remedial Design Reports

The Final Page Pond RDR shall be a continuation and expansion of the FS, associated technical memoranda, and Draft RDR. The Final RDR represents the 100% design final plans and specifications, and shall include the basic information described for the Draft RDR in addition to incorporating any changes necessary that arise from EPA's comments and modifications. The Final Page Pond RDR shall include the following:

- Design drawings.
- Design specifications.
- Design calculations.
- Design quality assurance considerations.
- General design concept and criteria of facilities to be constructed.
- Description of existing facilities and identification of any that will be altered, destroyed, or abandoned during construction.
- Description of off-site facilities required or affected.
- Analysis/discussion of Performance Standards and how they have been incorporated into the design.
- Design parameters dictated by the Performance Standards.

3.4 Remedial Action

3.4.1 Remedial Action Work Plans

The Remedial Action Work Plans shall provide for the construction of the remedy, in accordance with the SOW, as set forth in

design plans and specifications in any approved final design submittals required by the RDRs. The Remedial Action Work Plans shall be the primary plans to control and guide the construction of the Elements or Components of Work performed by the Settling Defendants under this Consent Decree.

- A Residential Areas Annual Remedial Action Work Plan addressing all Residential Areas Elements of Work shall be submitted annually as described in Section V of the SOW. Such work plans shall address the proposed remediation activities for Residential Yards, Water Well Closure, ROW, and Commercial Properties Elements of Work, to be completed within the boundaries of Area I during a construction season. An annual work plan may address all or a portion of one or more Reasonably Segregable Areas. A Page Pond Remedial Action Work Plan addressing the Page Pond Element of Work shall be submitted as described in Section V of the SOW. The Remedial Action Work Plans shall include, but are not limited to, the following:

- An overall description of the work to be performed with cross-references to other documents, if any, containing more specific details.
- The technical approach for undertaking, monitoring, and completing the Element or Component of Work. The discussion should include a description of the procedures, specific activities and objectives of such activities, and facilities to be installed; the Performance Standards; identification of and plans for obtaining any necessary off-site access, permits, or approvals; and identification of and plans for any materials requiring disposal.
- A description of the deliverables and milestones.
- A construction schedule.
- Sampling and analysis requirements, including field verification programs.
 - Sampling rationale and data quality objectives.
 - Sampling locations and frequency.
 - Sampling equipment and sampling, preservation, preparation and cleaning procedures.
 - Sampling chain of custody procedures.
 - Analytical methods and procedures.
- Construction O&M requirements.

- Plan for integrating, coordinating, and communicating with EPA, IDHW, and other government officials.
- Quality assurance measures including:
 - Audits.
 - Routine procedures, including internal quality control checks.
 - Corrective action procedures.
 - Construction-related QA/QC.
- Additional health and safety measures.
- QA/QC measures shall be in accordance with EPA guidance, including "Interim Guidelines and Specifications for Preparing Quality Assurance Project Plans", December 1980, (QAMS-005/80); "Data Quality Objective Guidance", (EPA/540/G87/003 and 004); and appropriate EPA Region 10 guidance.

3.4.2 Health and Safety Plan

A Remedial Action Health and Safety Plan shall establish health, safety, and emergency response procedures for field activities associated with the construction of each Element or Component of Work to be performed by the Settling Defendants. The Plan shall conform to applicable or appropriate Occupational Safety and Health Administration (OSHA) regulations, requirements, and guidance. This Health and Safety Plan shall comprehensively address all construction work in Area I of the Site. Specific Health and Safety issues pertinent to a single Element of Work shall be further addressed in that Remedial Action Work Plan. In that manner the comprehensive Health and Safety Plan shall be supplemented by the Residential Areas Annual Remedial Action Work Plans and the Page Pond Remedial Action Work Plan. The Plan, in conjunction with the above-referenced Remedial Action Work Plan, shall include, but is not limited to, the following basic information:

- Overall description of the Plan, including purpose and a general description of the Elements or Components of Work covered by the Plan.
- Emergency and post-emergency procedures, including the designation of the Settling Defendants' emergency response coordinator.
- Standard job site health and safety considerations and procedures, including hazards evaluation and chemicals of concern.

- Communication and notification procedures within the Settling Defendants' organization, and with EPA, State, other government officials, and community members.
- Personal Protection Equipment and instructions/procedures to ensure personnel protection and safety.
- Monitoring plans.
- Medical surveillance programs and training.
- Recordkeeping and reporting procedures.

3.4.3 Construction Completion Reports

The Construction Completion Reports certify the completion of construction of a particular Element or Component of Work. In the case of residential areas, a Construction Completion Report will be prepared annually. These reports will provide evaluations of completion of Work relative to the scope outlined in a Residential Areas Annual Remedial Action Work Plan. The Reports shall include, but are not limited to, the following:

- Overall description of the Report, including purpose and a general description of the Element(s) or Component(s) of Work covered by the Report.
- Overall description of the constructed Element(s) or Component(s) of Work and all associated facilities, appurtenances, and piping.
- Well Closure Records signed by the Settling Defendants' project coordinator or designated representative and records indicating that the work was performed by a well driller licensed in the State of Idaho.
- As-built plans or plot plans and specifications including:
 - Construction QA/QC records.
 - Summary of any modifications implemented by Technical Memoranda.
- An Idaho-registered Professional Engineer must sign and stamp as-built plans for the Page Pond Element of Work. As-built plans (plot plans) for the Remedial Actions in residential areas must be signed by the Settling Defendants' Project Coordinator, following the procedure outlined in Appendix E of the Final Residential Yards RDR.

3.4.4 Completion of Remedial Action Certification Reports

The Completion of Remedial Action Certification Reports shall be submitted upon completion of all Elements of Work within a Reasonably Segregable Area and achievement of Performance

Standards. These reports shall serve as the Settling Defendants' documentation supporting completion of the remedial actions and achievement of the Performance Standards within a Reasonably Segregable Area and to request certification from EPA approval, with a copy to the State, pursuant to Section XV of the Consent Decree. The Reports shall include, but are not limited to, the following information:

- Overall description of the Report, including purpose and a general description of the Reasonably Segregable Area including the Elements or Components of Work covered by the Report. The general description of the Reasonably Segregable Area shall include a description of the Work that was undertaken, objectives, period of operation, and Performance Standards.
- Findings and results of the pre-certification inspection, including documentation supporting that the Performance Standards, as appropriate, have been met.
- Contingency plans in the event Performance Standards are not achieved.
- Cross-references to the Construction Completion Report(s), which presents as-built drawings, corresponding to the Elements or Components of Work addressed by the Completion of Remedial Action Certification Report.
- Demonstration that all obligations for a Reasonably Segregable Area under this SOW and Consent Decree have been satisfactorily completed or achieved by the Settling Defendants in accordance with the Consent Decree.
- A statement by the Settling Defendants' Project Coordinator that Remedial Action has been completed in full satisfaction of the requirements of the Consent Decree.
- For residential areas, the following statement by an Idaho-registered Professional Engineer:

It is hereby certified that the thickness of the soil barrier layers constructed and the existence of a visual barrier in the designated residential yards, commercial properties, and rights-of-way within a Reasonably Segregable Area of the Site known as _____, represented by the inspection reports and sampling data included in the 'Residential Area Remediation Assessment and Certification' forms for the respective properties, is in full satisfaction of the Performance Standards for barrier thickness and placement of a visual barrier, as presented in the Bunker Hill Superfund Site

*Area I SOW and the Final Residential Yards,
Commercial Properties and Rights-of-Way RDRs.*

- For residential areas, the following statement by an Idaho-registered Professional Engineer, or an Idaho-registered Professional Geologist:

It is hereby certified that well closures, conducted within a Reasonably Segregable Area of the site known as _____, represented by the Well Closure Records and supporting information presented in the Construction Completion Reports, are in full satisfaction of the Performance Standards for well closure presented in the Bunker Hill Superfund Site Area I SOW and the Final Water Well Closure RDR.

- For Page Pond, a statement by an Idaho-registered Professional Engineer that the Remedial Action at Page Pond is in full satisfaction of the requirements of the Consent Decree.

3.4.5 Completion of the Work Report

This report shall be submitted after all phases of the Work (including any O&M obligations required by the Consent Decree) have been completed in full satisfaction of the requirements of this Consent Decree. Requirements of this report are set forth in Paragraph 52 of the Consent Decree. The Report shall comprehensively present the certifications by the Professional Engineer and Project Coordinator previously required for each Reasonably Segregable Area in the individual Completion of Remedial Action Certification Reports. Subsequent actions of the Settling Defendants, such as O&M requirements at Page Pond, and the current status of the various Reasonably Segregable Areas will be evaluated. If, after review, the Settling Defendants believe that the Work has been completed in full satisfaction of the Consent Decree, the report shall be submitted containing the following statement, signed by a responsible corporate official of the Settling Defendants or the Settling Defendants' Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

3.4.6 Page Pond Post-Closure Operation and Maintenance

(O&M) Plan

A plan addressing long-term operation and maintenance requirements for all aspects of Page Pond will be prepared. This document shall reflect the specific post-remediation activities required to maintain remedy effectiveness at Page Pond and shall include, but not be limited to:

- Operational procedures.
- Operational emergency response.
- Maintenance procedures and schedules.
- Monitoring procedures and schedules.
- Parts and equipment inventory.
- Compliance plan that describes the procedures to be used to guide the compliance testing activities and acceptance procedures for demonstrating compliance with the objectives and Performance Standards associated with the particular Element or Component of Work.
- Biomonitoring (long term).

3.4.7 Page Pond Annual Monitoring Report

A report presenting the results of ongoing monitoring activities at Page Pond will be prepared annually, as specified in the Draft Page Pond RDR. The annual reports shall include, but are not limited to the following:

- Results of sediment and water quality monitoring conducted as specified in the Draft Page Pond RDR.
- Results of biomonitoring conducted as specified in the Draft Page Pond RDR.
- A brief evaluation of the current year's data relative to historical data and biomonitoring data from similar areas in the region.

4.0 DELIVERABLES

This section presents listings of deliverables associated with the Work. Two sets of deliverables will be developed for Work conducted after completion of the remedial design; one set will apply to remedial action at Page Pond, and the other set will apply to remedial action for Residential Areas. Residential Areas shall consist of the following Elements of Work occurring within Area I boundaries as delineated by the Allocation Map: Rights-of-Way, Commercial Properties, Residential Yards, and Water Well Closure.

4.1 Remedial Design

The following separate deliverables, for the corresponding Elements of Work, apply to Work conducted through completion of the remedial design:

- Draft Residential Yards RDR
 - Final Remedial Design Report (Attachment E to Consent Decree)
- Draft Page Pond RDR
 - Draft Remedial Design Report (Attachment F to Consent Decree)
 - Final Remedial Design Report
- Draft Rights-of-Way RDR
 - Final Remedial Design Report (Attachment G to Consent Decree)
- Draft Commercial Properties RDR
 - Final Remedial Design Report (Attachment H to Consent Decree)
- Draft Water Well Closure RDR
 - Final Remedial Design Report (Attachment I to Consent Decree)

4.2 Remedial Action

4.2.1 Page Pond

For the Page Pond Element of Work, the following deliverables will be required after completion of the remedial design phase:

- Draft Remedial Action Work Plan
- Final Remedial Action Work Plan
- Monthly Progress Reports
- Construction Completion Report
- Completion of Remedial Action Certification Report
- Post Closure O&M Plan
- Page Pond Annual Monitoring Report

4.2.2 Residential Areas

For the Residential Areas, a Residential Areas Annual Remedial Action Work Plan will be submitted. This Work Plan shall address the Residential Yards, Rights-of-Way, Commercial Properties, and Water Well Closures for a given geographic area. The Work Plan and other subsequent deliverables are listed below.

- Draft Residential Areas Annual Remedial Action Work Plan
- Final Residential Areas Annual Remedial Action Work Plan
- Monthly Progress Reports
- Construction Completion Reports (annually including Plot Plans)
- Completion of Remedial Action Certification Report (per Reasonably Segregable Area)

4.3 Health and Safety Plan

In addition to the above reports a comprehensive Health and Safety Plan is also recognized as a deliverable for Area I Elements of Work. Details regarding sampling and analysis will be included as part of the Remedial Action Work Plans.

4.4 Completion of Work Report

A Completion of Work Report will also ultimately be prepared.

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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE DISTRICT OF ARIZONA**

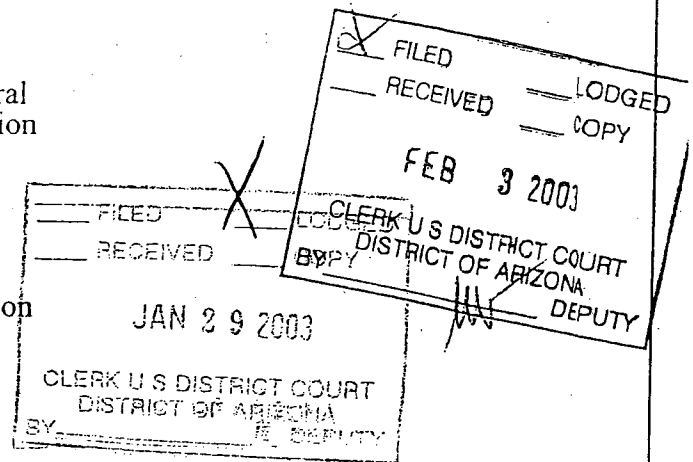
16 **UNITED STATES OF AMERICA,**

17 **Plaintiff,**

18 **v.**

19 **ASARCO, INC. and SOUTHERN PERU**
20 **HOLDINGS CORPORATION,**

21 **Defendant.**



22 **THIS DOCUMENT IS NOT IN PROPER FORM ACCORDING**
TO FEDERAL AND OR LOCAL RULES AND PRACTICES
AND IS SUBJECT TO REVIEW BY THE COURT.
REFERENCE: 1.9(c)(2)
(Rule Number/Section)

23 **I. BACKGROUND**

24 A. The United States filed its Complaint in this action on August 9, 2002, seeking
25 declaratory relief pursuant to 28 U.S.C. § 2201 regarding the rights and obligations of the
26 parties under Section 3304 of the Federal Debt Collection Procedures Act of 1990
27 ("FDCPA"), 28 U.S.C. § 3304, and the Federal Priorities Act ("FPA"), 31 U.S.C. § 3713, and
28 seeking appropriate injunctive relief.

1 B. Defendant ASARCO Incorporated ("ASARCO") is incorporated in the State of
2 New Jersey and maintains its principal place of business at 2575 E. Camelback Rd., Phoenix,
3 Arizona. Defendant Southern Peru Holdings Corporation ("SPHC") is incorporated in the
4 State of Delaware and maintains its principal place of business at 2575 E. Camelback Rd.,
5 Phoenix, Arizona. SPHC is a holding company and is a wholly owned subsidiary of ASARCO.
6 ASARCO is a wholly owned subsidiary of Americas Mining Corporation ("AMC"), which is
7 incorporated in the State of Delaware. AMC is a wholly owned subsidiary of Grupo Mexico
8 S.A. de C.V. ("Grupo Mexico"), a Mexican corporation.

9 C. ASARCO has established liabilities to the United States. These include, but are
10 not limited to, environmental clean-up and/or payment obligations under the following civil
11 judgments: *United States v. ASARCO* (W.D. Wash.), Civil Action No. C91-5528 B; *United*
12 *States v. ASARCO* (W.D. Wash.), Civil No. C94-5714RJB; *United States and State of Idaho*
13 *v. ASARCO, et al.* (D. Idaho), Civil Action No. 94-206-N-EJL; *United States and State of*
14 *Texas v. Encycle/Texas and ASARCO* (S.D. Texas), Civil Action H-99-1136; *United States*
15 *v. ASARCO* (D. Mont.), CV 98-3-H-CCL; *United States v. ASARCO* (D. Mont.), CV-90-46-H-
16 CCL; *United States and State of Arizona v. ASARCO* (D. Ariz.), No. CIV 98-0137 PHX ROS;
17 *United States v. ASARCO* (D. Colo.), Civil Action Nos. CV-83-C-2388 and 86-C-1675;
18 *United States v. ASARCO* (D. Utah), Civil Action No. 2:98CV-0415B; *United States v. ARCO,*
19 *et al.* (D. Montana), Civil Action No. 02-35-Bu-RFC; and *United States v. ASARCO, et al.* (D.
20 Kansas), Civil Action No. 99-1399.

21 D. ASARCO also has environmental liabilities to the United States under
22 administrative orders on consent issued by the United States Environmental Protection Agency
23 ("EPA") and the United States Department of Agriculture ("USDA") pursuant to the
24 Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42
25 U.S.C. § 9601 *et seq.*, including but not limited to the following: *In the Matter of Circle*
26 *Smelting, Beckemeyer, IL*, EPA Docket No. V-W-97-C-419; *In the Matter of Removal Action*
27 *- East Helena Superfund Site*, EPA Docket No. CERCLA-VIII-91-17, June 20, 1996; *In the*
28 *Matter of RI/FS, Vasquez Blvd./Interstate 70 (Denver, CO)*, CERCLA-08-2001-13,

1 September 25, 2001; *In the Matter of Jasper County/Tri-State Mining Area Site*, 91-F-0020,
2 August 2, 1991; *In the Matter of Newton County Mine Tailings Site*, VII-96-F-0022, June 17,
3 1997; *In the Matter of Federal Mine Tailings Site*, VII-97-F-0009, September 30, 1997; *In*
4 *the Matter of Big River/St. Francois County Mining Area Site*, VII-97-F-0002, January 29,
5 1997; *In the Matter of Jack Waite Mine Site* (USDA), Idaho Panhandle National Forest, EPA
6 Docket No. 10-98-00--CERCLA, March 30, 2000; and *In the Matter of Upper Blackfoot*
7 *Mining Complex, Helena National Forest, Montana* (USDA., Forest Service, Northern
8 Region).

9 E. The United States alleges that ASARCO also has environmental liabilities under
10 EPA unilateral administrative orders as follows: *In the Matter of Commencement Bay*
11 *Nearshore/Tideflats Site (Sediments/Groundwater OU)*, CERCLA 10-2002-0046; *Silver*
12 *Bow Creek/Butte Area Site (Mine Flooding OU)*, CERCLA-VIII-96-19, June 11, 1996; *In the*
13 *Matter of Newton County Mine Tailings Site*, 07-2002-0114, April 15, 2002; *In the Matter*
14 *of Omaha Lead Site*, CERCLA-7-99-F-0029, August 24, 1999.

15 F. ASARCO is a defendant in an ongoing civil action, *United States v ASARCO, et*
16 *al* (D. Idaho), Civil Action Nos. 96-0122-N-EJL/91-0342-N-EJL (Consolidated Cases),
17 brought under Section 107(a) of CERCLA for recovery of response costs and damages for
18 injury to, destruction of, or loss of natural resources at the Coeur d'Alene River Basin in Idaho,
19 which is part of the Bunker Hill Mining and Metallurgical Complex Superfund Facility
20 Operable Unit 3.

21 G. Although not yet subject to formal proceedings, the United States contends that
22 ASARCO is liable under Section 106 and/or 107 of CERCLA, 42 U.S.C. §§ 9606, 9607, for
23 response actions and repayment of response costs incurred or to be incurred at a number of
24 additional sites, including but not limited to the Richardson Flat Site, Park City, UT; the El
25 Paso County Metal Survey Site, El Paso, TX; the Omaha Smelter Site, Omaha, NE; and the
26 Hayden Mine and Smelter Site, Hayden, AZ. Moreover, based on ASARCO's mining and
27 operational history, ASARCO stands exposed to the potential that additional environmental
28 liabilities will arise or be discovered in the future.

1 H. ASARCO has been unable to comply fully with its environmental remediation
2 obligations over at least the last two years.

3 I. ASARCO is and has been, and/or the United States claims that ASARCO is and
4 has been, in violation of a number of the various consent decrees, administrative orders on
5 consent and unilateral administrative orders referenced in Paragraphs C, D, and E, as the result
6 of its actual or alleged noncompliance with the requirements, terms and conditions of those
7 consent decrees or orders, including financial assurance requirements. ASARCO stands
8 exposed to claims for stipulated and statutory penalties in excess of \$100,000,000 for such
9 noncompliance. Because ASARCO's noncompliance with several outstanding consent decrees
10 and orders continues, ASARCO's exposure to stipulated and statutory penalties increases
11 significantly every day.

12 J. ASARCO would have to spend in excess of \$150 million in calendar years 2003
13 through 2005 if required to perform all Environmental Response work that it is obligated to
14 the United States to perform by the end of that calendar year and to reimburse the United
15 States for all of the United States' existing claims for past Environmental Response Costs.

16 K. In July 2002, ASARCO informed the United States that ASARCO and SPHC
17 intended to sell their stock holdings and majority ownership interest in the Southern Peru
18 Copper Corp. ("SPCC") to AMC and informed the United States of the proposed terms for this
19 transfer.

20 L. The Complaint filed in this action seeks a judgment declaring that the proposed
21 terms of the sale and transfer of ASARCO/SPHC's ownership interest in SPCC, as represented
22 by ASARCO to the United States in July 2002, violate Sections 3304(a)(1), 3304(a)(2), and
23 3304(b)(1)(B)(ii) of the FDCPA, 28 U.S.C. §§ 3304(a)(1), 3304(a)(2), and 3304(b)(1)(B)(ii),
24 as well as the FPA, 31 U.S.C. § 3713, and seeks preliminary and permanent injunctive relief
25 enjoining this sale and transfer under such proposed terms.

26 M. ASARCO represents that: (a) the sale and transfer of the ASARCO/SPHC
27 ownership interest in SPCC is necessary for the financial viability of ASARCO and to
28 eliminate the outstanding secured debt which had originally been due and payable on November

1 10, 2002; (b) with the approval of this settlement, ASARCO fully intends to continue its
2 operations for at least the next 12 months following approval; and (c) ASARCO fully intends
3 to fulfill all of its environmental obligations to the U.S., States, Tribes, and pursuant to private
4 party civil litigation settlements to the fullest extent of its capabilities.

5 N. ASARCO and SPHC represent that they believe the sale and transfer of their
6 stock and ownership interest in SPCC as structured under the terms of this Consent Decree
7 provides reasonably equivalent value for their interest in SPCC. ASARCO and SPHC provide
8 support for that representation in Appendix I.

9 O. In consideration of the covenants of the United States as set forth in Section X
10 of this Consent Decree, ASARCO agrees to the creation of an Environmental Trust under the
11 terms and conditions set forth in this Consent Decree and in the Trust Agreement.

12 P. In creating the Environmental Trust provided for as part of this Consent Decree,
13 it is the intent of the Parties that ASARCO have no beneficial, equitable or legal interest in the
14 Environmental Trust. The beneficiary of the Environmental Trust shall be the United States in
15 its capacity as enactor and enforcer of laws protecting the environment and the health and
16 welfare of its citizens.

17 Q. By entering into this Consent Decree the Defendants do not admit any liability
18 arising out of the transactions or occurrences alleged in the complaint, nor do they admit to
19 the truth of any of the allegations contained in the complaint. Moreover, by entering into this
20 Consent Decree, the Defendants do not admit any liability under CERCLA or any other
21 environmental statute regarding any Site.

22 R. The Parties recognize, and the Court by entering this Consent Decree finds, that
23 this Consent Decree has been negotiated by the Parties in good faith; implementation of this
24 Consent Decree will avoid prolonged and complicated litigation between the Parties; and this
25 Consent Decree is fair, reasonable, and in the public interest.

26 NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:
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II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1345, 2201, 3004, and 3306. This Court also has personal jurisdiction over the Defendants. The Defendants waive all objections and defenses that they may have to the jurisdiction of the Court over all matters relating to or arising out of this Consent Decree or the Complaint in this action, or to the personal jurisdiction of the Court over the Defendants in all matters relating to or arising out of this Consent Decree or the Complaint in this action, or to venue in this District. Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

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III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States and upon ASARCO and SPHC and their successors and assigns. Any change in ownership or corporate status of ASARCO or SPHC, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter ASARCO's or SPHC's responsibilities under this Consent Decree.

3. AMC is a signatory to this Consent Decree, and AMC and its successors and assigns are bound solely with respect to its obligations set forth in Appendix A and Appendix B; this Paragraph; and Paragraphs 6.b, 6.c, 9, 10, 39 and 40. Grupo Mexico is a signatory to this Consent Decree, and Grupo Mexico and its successors and assigns are bound solely with respect to its obligations set forth in Appendix D; this Paragraph; and Paragraphs 6.d, 9, 10, 39, and 40. Any change in ownership or corporate status of AMC or Grupo Mexico, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter AMC's or Grupo Mexico's obligations under this Consent Decree and the related Notes and Guaranty. AMC and Grupo Mexico consent to the jurisdiction of this Court, and agree that they will not challenge, in any action brought by the United States to enforce the terms and conditions of this Consent Decree, the jurisdiction of this Court to enter this Consent Decree or the

1 personal jurisdiction of this Court to enforce the specific obligations, conditions, or
2 requirements to which they are subject pursuant to this Consent Decree.

4 IV. DEFINITIONS

5 4. Unless otherwise expressly provided herein, terms used in this Consent Decree
6 which are defined in CERCLA or in regulations promulgated under CERCLA shall have the
7 meaning assigned to them in CERCLA or in such regulations. All dollar amounts specified in
8 this Consent Decree refer to United States dollars. Whenever terms listed below are used in
9 this Consent Decree or in the appendices attached hereto and incorporated hereunder, the
10 following definitions shall apply:

11 "Annual Budget" shall have the meaning defined in Section VIII of this Consent Decree,
12 and includes any amended Annual Budget accepted by the Trustee pursuant to Paragraph 25.

13 "CERCLA" shall mean the Comprehensive Environmental Response, Compensation,
14 and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

15 "Circle Smelting Non-Time Critical Removal Site" shall mean that facility located in
16 Beckemeyer, Illinois that has been subject to a non-time critical removal action.

17 "Closing Date" shall mean the date on which the documents contained in Appendices
18 A through H are fully executed and exchanged by all necessary signatories to those documents.

19 "Commencement Bay Nearshore/Tideflats Superfund Site - Relevant Operable Units"
20 shall mean three of the seven operable units that are part of the Commencement Bay/Tideflats
21 Superfund Site in Tacoma Washington. The three relevant operable units are (a) the ASARCO
22 Tacoma Smelter and Slag Peninsula Operable Unit; (b) the ASARCO Off-Property (Ruston/
23 North Tacoma Study Area) Operable Unit; and (c) the ASARCO Sediments/Groundwater
24 Operable Unit.

25 "Consent Decree" shall mean the text of this Decree and all appendices attached hereto
26 (listed in Paragraph 50). In the event of conflict between the text of this Decree and any
27 appendix, the text of this Decree shall control.

1 "Day" shall mean a calendar day unless expressly stated to be a working day. "Working
2 day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any
3 period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday,
4 or Federal holiday, the period shall run until the close of business of the next working day.

5 "Defendants" shall mean ASARCO and SPHC.

6 "Environmental Response" shall mean (1) a response within the meaning of Section 101
7 of CERCLA, 42 U.S.C. § 9601, at any Site, (2) a corrective action or imminent hazard
8 abatement action required or performed pursuant to the Resource Conservation and Recovery
9 Act ("RCRA"), 42 U.S.C. § 6901 *et seq*, or a state hazardous waste program authorized
10 pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, at any Site, and (3) the planning and
11 implementation of measures to restore, replace or acquire the equivalent of natural resources
12 that have been injured by releases of hazardous substances at the Bunker Hill Mining and
13 Metallurgical Complex Superfund Facility.

14 "Environmental Response Costs" shall mean all costs incurred in connection with the
15 performance of any Environmental Response. However, this definition does not include (1)
16 any costs incurred prior to February 1, 2003; (2) any attorneys' fees incurred by ASARCO; (3)
17 any internal costs of ASARCO associated with ASARCO's employees or operations, except
18 where (i) sampling and analytical laboratory costs are incurred in lieu of retaining an outside
19 contractor for performance of the same sampling and analytical laboratory work, (ii) such
20 costs were the low bid out of at least three bids, and (iii) such costs are included on a Annual
21 Budget; (4) any costs incurred by other potentially responsible parties who may have a claim
22 for recovery of such costs against ASARCO, other than costs incurred pursuant to a Annual
23 Budget under this Consent Decree; or (5) any costs associated with compliance under
24 environmental laws other than CERCLA or RCRA.

25 "Environmental Trust" shall mean the trust created pursuant to Section VII below and
26 the Trust Agreement.

27 "Force majeure" shall mean any event arising from causes beyond the control of the
28 Defendants, of any entity controlled by the Defendants, or of the Defendants' contractors, that

1 delays or prevents the performance of any obligation under this Consent Decree despite the
2 Defendants' best efforts to fulfill the obligation. The requirement that the Defendants exercise
3 "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential
4 force majeure event and best efforts to address the effects of any potential force majeure event
5 (1) as it is occurring and (2) following the potential force majeure event, such that the delay
6 is minimized to the greatest extent possible. "Force Majeure" does not include financial
7 inability to complete Environmental Response work, subject to the limits prescribed in
8 Paragraph 33.

9 "Globe Plant" shall mean that 89 acre parcel of land owned by ASARCO and located in
10 Adams and Denver counties with an office address of 495 East 51st Avenue, Denver, Colorado
11 80216-2098.

12 "Guaranty" shall mean Grupo Mexico's written guaranty regarding exclusively Note B
13 that is attached as Appendix D to this Consent Decree.

14 "Murray Smelter Consent Decree - Relevant Section" shall mean the Consent Decree
15 for remedial action entered in the United States District Court for the District of Utah
16 captioned: United States v. ASARCO Inc. et al., Civil Action No. 2:98CV0451B. Specifically
17 this definition includes only those costs required to be paid pursuant to Section XVI, Paragraph
18 67a and 67b, of that consent decree.

19 "Note A" shall mean that \$123.25 million promissory note issued by AMC to SPHC
20 that is attached as Appendix A to this Consent Decree.

21 "Note B" shall mean that \$100 million promissory note issued by AMC to SPHC that
22 is attached as Appendix B to this Consent Decree.

23 "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral
24 or upper case letter.

25 "Parties" shall mean the United States, ASARCO and SPHC.

26 "Performing Entity" shall mean any person or entity, including but not limited to the
27 United States and ASARCO, designated in a Proposed Annual Budget or Annual Budget as
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1 having the right to seek reimbursement for the performance of specified work projects under
2 such Annual Budget, as provided in Paragraphs 21, 23, and 25.

3 "Proposed Annual Budget" shall have the meaning given in Section VIII of this Consent
4 Decree.

5 "Revolver Notes" shall mean the \$450 million indebtedness owed by ASARCO to a
6 consortium of lenders as of the date of this Consent Decree that is secured by
7 ASARCO/SPHC's stock and ownership interest in SPCC.

8 "Section" shall mean a portion of this Consent Decree identified by a roman numeral.

9 "Site" shall mean (1) any facility addressed in an existing or future judicial consent
10 decree to which the United States and ASARCO are parties, or in an existing or future
11 administrative order on consent or unilateral administrative order issued to ASARCO by a
12 federal agency or department, which requires site investigation or other response action under
13 Sections 104(a) or 106 of CERCLA or Sections 3008(h) or 7003 of RCRA; or (2) any facility
14 at which ASARCO is identified by EPA as a potentially responsible party ("PRP") under
15 CERCLA and which either now or in the future (a) is listed or proposed for listing on the
16 National Priorities List pursuant to Section 105 of CERCLA or (b) is determined by EPA to
17 have a Hazard Ranking System score of at least 28.5 and at which a CERCLA response action
18 is being performed or overseen by EPA, the U.S. Department of the Interior ("DOI"), or the
19 U.S. Department of Agriculture ("USDA"), or by a state agency that has been formally
20 designated as the lead response agency by EPA pursuant to 40 C.F.R. Part 35, Subpart O; or (3)
21 any facility that the United States and ASARCO agree, in an Annual Budget prepared pursuant
22 to the Consent Decree, should receive funding for Environmental Response work from the
23 Environmental Trust.

24 "Stipulation" shall mean the Amended Stipulation among the Parties lodged with the
25 Court on October 11, 2002, and entered on the docket October 16, 2002, and all prior
26 stipulations among the Parties in this matter.

27 "Subparagraph" shall mean a portion of this Consent Decree identified by a lower case
28 letter.

1 "Trust Agreement" shall mean the agreement establishing the Environmental Trust,
2 which is attached as Appendix F to this Consent Decree.

3 "Trustee" shall mean the trustee of the Environmental Trust.

4 "United States" shall mean the United States of America, including its departments,
5 agencies, and instrumentalities.

6
7 **V. TERMS AND CONDITION OF SPCC STOCK TRANSFER**

8 5. The Parties agree that Defendants shall not assign, sell or transfer any stock or
9 ownership interest in SPCC except under the specific terms and conditions set forth in the
10 Agreement of Sale (attached hereto as Appendix C).

11 6. The Agreement of Sale shall include the following terms and conditions:

12 a. The following events shall occur on the Closing Date:

13 i. SPHC shall transfer its entire ownership interest in SPCC stock to
14 AMC;

15 ii. AMC shall pay to ASARCO/SPHC the sum of \$500 million, \$450
16 million of which shall be used exclusively to satisfy in full ASARCO's
17 indebtedness under the Revolver Notes;

18 iii. ASARCO/SPHC shall satisfy in full its indebtedness under the
19 Revolver Notes;

20 iv. AMC and/or its affiliates shall cancel the \$41.75 million claim of
21 debt they have against ASARCO and/or SPHC, and, if the contingency in
22 Paragraph 8 occurs, the \$50 million debt described in Paragraph 8;

23 v. AMC shall execute and deliver to SPHC a promissory note in the
24 amount of \$123.25 million, the terms of which shall provide for
25 payments in seven equal principal installments of \$17,607,143.00, each
26 installment due and payable on October 31 of each year beginning
27 October 31, 2003, plus accumulated interest on the principal balance at
28 the rate of 7% per annum (Note A, attached hereto as Appendix A);

1 vi. AMC shall execute and deliver to SPHC a promissory note in the
2 amount of \$100 million, the terms of which shall provide for payments
3 in eight equal principal installments of \$12.5 million, each installment
4 due and payable on May 31 of each year beginning May 31, 2003, plus
5 accumulated interest on the principal balance at the rate of 7% per annum
6 (Note B, attached hereto as Appendix B);

7
8 *not A* vii. Grupo Mexico shall execute a guaranty agreement guaranteeing
9 AMC's performance under Note B (Guaranty, attached hereto as
Appendix D);

10 viii. SPHC shall irrevocably assign any and all interest it has in Note B
11 and the Guaranty to ASARCO. The document creating that assignment
12 is attached hereto as Appendix E;

13 ix. ASARCO shall execute the Trust Agreement, attached hereto as
14 Appendix F, creating the Environmental Trust prescribed pursuant to
15 Section VII;

16 x. ASARCO shall execute a Security Agreement, attached hereto as
17 Appendix G, in favor of the United States which provides the United
18 States a security interest in Note B and the Guaranty and any proceeds
19 thereof to secure the performance of Environmental Response or the
20 reimbursement of Environmental Response Costs at any or all of the
21 Sites. The collateral for this security interest shall be Note B and the
22 Guaranty and any proceeds thereof. The Security Agreement may be
23 modified by agreement of the United States and ASARCO before
24 execution, provided that the terms and conditions of the Security
25 Agreement as modified are substantially equivalent to the original terms
26 and conditions as set forth in Appendix G and in this Paragraph; and
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1 xi. ASARCO shall irrevocably assign any and all interest it has in Note
2 B and the Guaranty to the Environmental Trust. The document creating
3 that assignment is attached hereto as Appendix H.

4 b. ASARCO/SPHC and AMC agree that the dividend share based on
5 ownership of the SPCC stock arising from SPCC operations during the Fourth
6 Quarter of 2002 shall be paid to ASARCO regardless of which party is the actual
7 shareholder of record on the date the right to the dividend vests.

8 c. AMC shall make all payments required under the terms of Note B
9 directly to the Trustee of the Environmental Trust.

10 d. Grupo Mexico shall make all payments, if any, required under the terms
11 of the Guaranty directly to the Trustee of the Environmental Trust.

12 7. Upon the occurrence of all events required to occur as of the Closing Date in
13 conformity with all terms and conditions specified in this Section, and not before such time,
14 the Stipulation shall be deemed terminated.

15 8. In the event that the Stipulation is not terminated on or before January 31, 2003,
16 AMC has represented that it may choose to loan ASARCO \$50 million solely for the purpose
17 of satisfying, in part, the payment due to the holders of the "Yankee" bonds that mature on
18 February 3, 2003. If such loan is made, AMC shall pay to ASARCO/SPHC the sum of \$450
19 million instead of \$500 million pursuant to Paragraph 6.a.ii.

20
21 **VI. ENFORCEABILITY OF NOTES AND GUARANTY**

22 9. The Parties, AMC, and Grupo Mexico agree that Note B and the Guaranty shall
23 be directly enforceable by the United States under the terms of this Consent Decree, both on
24 its own behalf and, as beneficiary, on behalf of the Environmental Trust.

25 10. The Parties, AMC, and Grupo Mexico agree that this Court has full jurisdiction
26 and legal authority to enforce Notes A and B and the Guaranty, and to enter any appropriate
27 relief otherwise available under applicable law in the event of nonperformance or default.
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1 11. Nothing in this Consent Decree shall limit or abridge any other remedy available
2 to the United States, the Trustee, or any other person to enforce the terms of Notes A and B
3 and the Guaranty.

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5 **VII. ENVIRONMENTAL TRUST**

6 12. An Environmental Trust shall be established for the sole purpose of funding
7 Environmental Response Costs at any or all of the Sites, under the terms and conditions of the
8 Trust Agreement, attached hereto as Appendix F. The Trust Agreement may be modified
9 according to its terms. If the Trust Agreement is modified, it must be reexecuted and promptly
10 filed with the Court.

11 13. The Environmental Trust shall be administered by an independent Trustee
12 appointed pursuant to the Trust Agreement.

13 14. The Environmental Trust shall initially be funded by the assignment of Note B
14 and the Guaranty to the Trust, as prescribed under Paragraph 6.a.xi of this Consent Decree. All
15 payments on Note B and/or the Guaranty shall be made directly to the Trustee on behalf of the
16 Trust.

17 15. The assets of the Environmental Trust shall be used for no purpose other than
18 to pay Environmental Response Costs at any or all of the Sites, or for administration of the
19 Environmental Trust consistent with the Trust Agreement.

20 16. In structuring and administering the Environmental Trust under this Consent
21 Decree, the Trustee may seek to minimize any tax liability to which the assets of the
22 Environmental Trust might be subject.

23
24 **VIII. ANNUAL BUDGET AND WORK SCHEDULES**

25 17. On an annual basis, for so long as there are funds of the Environmental Trust, a
26 budget and work schedule shall be finalized in accordance with the provisions of the Trust
27 Agreement and this Section.

1 18. Within thirty (30) days of the date of entry of the Consent Decree, ASARCO and
2 the United States shall meet in good faith to establish an initial annual budget and work
3 schedule consistent with this Section for the remainder of the calendar year 2003. If
4 agreement is reached, and after any consultation with any State or Tribe the United States
5 deems appropriate, this budget and schedule shall be deemed the Annual Budget for calendar
6 year 2003. The United States shall promptly deliver the Annual Budget to the Trustee. If
7 ASARCO and the United States are unable to reach agreement, the United States shall
8 determine the Annual Budget for calendar year 2003 after any consultation with any State or
9 Tribe the United States deems appropriate, and the United States shall promptly deliver such
10 budget to the Trustee. The decisions of the United States made pursuant to this Paragraph shall
11 be in its sole and unreviewable discretion and shall not be subject to further dispute resolution
12 or challenge, nor shall they constitute final agency action giving rise to judicial review.

13 19. Thereafter, no later than the first day of November of each calendar year that the
14 Environmental Trust is in existence, ASARCO shall submit to the United States an Environ-
15 mental Response Report. This report shall include the following:

16 a. A description of all Environmental Response work performed by
17 ASARCO at each Site during the current calendar year and the actual cost of such
18 performance to ASARCO;

19 b. A Site by Site description of all Environmental Response work which
20 ASARCO is responsible for performing during the upcoming calendar year under
21 existing consent decrees or administrative orders, and general cost estimates for such
22 work.

23 c. An Environmental Response work proposal for the upcoming calendar
24 year, which shall include

25 i. a description of the Environmental Response work that ASARCO
26 proposes be funded by the Environmental Trust Fund during the upcom-
27 ing calendar year (and additional years if warranted by the nature of the
28 work);

- ii. a description of the portion of the work identified in Paragraph 19.c.i that ASARCO proposes to undertake;
- iii. a cost estimate for this proposed work; and
- iv. a detailed justification for ASARCO's selection of proposed work as opposed to the other potential Environmental Response work for which ASARCO is responsible, or for which the United States has deemed ASARCO a Potentially Responsible Party, during the upcoming calendar year (and additional years if warranted by the nature of the work); and
- v. a list of continuing multi-year allocations provided in prior Annual Budgets, if any.

20. Should ASARCO not timely submit an Environmental Response Report, the United States shall proceed to develop a Proposed Annual Budget in accordance with the procedures set forth in Paragraph 21.

21. After any consultation with any State or Tribe the United States deems appropriate, but no later than 45 days after the due date for submission of the Environmental Response Report as prescribed in Paragraph 19, the United States shall serve upon ASARCO a Proposed Annual Budget of Environmental Response work to be completed within the upcoming calendar year. The Proposed Annual Budget shall include a description of the Environmental Response work to be performed, a designation of ASARCO, the United States, and/or some other Performing Entity as having the right to seek reimbursement for the performance of each specified work project under the budget and schedule, and a budget allocating Environmental Trust monies to fund performance of the response work described in the Proposed Annual Budget and to reimburse the United States and/or a State for their Environmental Response Costs.

22. Following ASARCO's receipt of the United States' Proposed Annual Budget, ASARCO and the United States shall engage in a period of consultation not to exceed thirty (30) days to expeditiously and informally discuss the Proposed Annual Budget and to consider any suggested modifications. Within fifteen days of the conclusion of the period of

1 consultation, the United States shall determine the Annual Budget and provide the budget to
2 ASARCO and the Trustee. The decisions of the United States made pursuant to this Paragraph
3 shall be in its sole and unreviewable discretion and shall not be subject to further dispute
4 resolution or challenge, nor shall they constitute final agency action giving rise to judicial
5 review.

6 23. Within twenty (20) days of receipt of an Annual Budget pursuant to Paragraph
7 18 or 22, the Trustee shall notify the United States and ASARCO in writing that the Trustee
8 either accepts or rejects such Annual Budget. The Trustee is obligated to accept and
9 administer any Annual Budget submitted by the United States unless the Trustee concludes that
10 such budget and schedule would be inconsistent with the stated purpose of the Environmental
11 Trust or any conditions or limitations set forth in the Environmental Trust Agreement. A
12 notice of rejection under this Paragraph shall contain an explanation of the Trustee's rejection
13 of the Annual Budget. In the event of a rejection determination by the Trustee under this
14 Paragraph, the United States may either submit a new budget and schedule in accordance with
15 the provisions of Paragraphs 21 and 22 of this Consent Decree, or may seek review by this
16 Court of the Trustee's decision to reject the Final Budget.

17 24. All Annual Budgets must be established in light of the anticipated availability
18 of funds in the Environmental Trust and shall not require the Trust to pay more money than it
19 is reasonably anticipated will be available from the Trust Fund for any calendar year. Annual
20 Budgets shall provide only for the payment of Environmental Response Costs at Sites;
21 however, not every Site is required to be addressed in any given Annual Budget. Annual
22 Budgets shall not be in conflict with ASARCO's existing work obligations specifically set
23 forth in any consent decree or order except where a modification of such other consent decree
24 or order may be sought pursuant to Section XIII. In such cases, the requirements of any Annual
25 Budget that conflicts with ASARCO's existing work obligations under any consent decree or
26 administrative order shall be expressly conditioned upon obtaining a modification pursuant to
27 Section XIII. Where warranted by the nature of the planned Environmental Response work, an
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1 Annual Budget may include a planned allocation of projected Environmental Trust funds over
2 a multi-year period.

3 25. An Annual Budget accepted by the Trustee may be amended only by written
4 agreement of ASARCO and the United States, subject to review by the Trustee. Either
5 ASARCO or the United States may propose amendments to the current Annual Budget by
6 service of the proposal on the other party. If ASARCO and the United States reach agreement
7 on the amendment, the United States shall promptly provide the amended Annual Budget to the
8 Trustee. Any amended Annual Budget shall be subject to the conditions and limitations set
9 forth in Paragraph 24. The procedures prescribed in Paragraph 23 governing acceptance or
10 rejection of Annual Budgets shall apply to acceptance or rejection of amended Annual Budgets
11 submitted to the Trustee under this Paragraph.

12 26. ASARCO shall have the right to seek review by this Court of the Trustee's
13 acceptance of an Annual Budget solely on the following limited grounds:

14 a. the Annual Budget would require the Trust to pay monies at a facility that
15 is not a Site as that term is defined in this Decree;

16 b. the Annual Budget conflicts with ASARCO's existing work obligations
17 specifically set forth in an existing consent decree or order and the conflicting
18 provision or provisions are not expressly conditioned upon obtaining a
19 modification of the existing consent decree or order pursuant to Section XIII;

20 c. the Annual Budget would require the Trust to pay monies for costs that
21 are not Environmental Response Costs as that term is defined in this Decree;

22 d. the Annual Budget would require the Trust to pay more money than it is
23 reasonably anticipated will be available from the Trust Fund for any calendar
24 year; or

25 e. the Annual Budget does not adequately fund the performance of
26 Environmental Response work for which ASARCO has been designated as
27 responsible under such Annual Budget.
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1 Review sought pursuant to this Paragraph shall be by petition to this Court. Such petition must
2 be filed no later than ten days after the date of receipt of a notice of the Trustee's acceptance
3 of an Annual Budget pursuant to Paragraph 23. As provided in the Trust Agreement, the Trustee
4 shall, and the United States may, file a memorandum in support of the Annual Budget being
5 challenged within 30 days of service of a petition under this Paragraph. The Court shall affirm
6 the Trustee's decision unless there is clear and convincing evidence that one of the four
7 grounds for challenge set forth in this Paragraph exists. This Paragraph constitutes the
8 exclusive mechanism by which the Defendants may challenge or dispute an Annual Budget, and
9 the Defendants agree not to invoke any other dispute resolution mechanism, including any
10 dispute resolution mechanism provided for in any existing consent decree or administrative
11 order.

12 27. ASARCO shall perform all Environmental Response work for which it has been
13 designated as responsible under any Annual Budget during the current calendar year for such
14 Annual Budget, provided, however, that ASARCO shall not be responsible for performing or
15 completing such Environmental Response work (a) in the event of a Force Majeure, or (b) to
16 the extent, and only to the extent, that ASARCO is unable to perform or complete such
17 Environmental Response work because insufficient funds were allocated in such Annual
18 Budget for reimbursement of the cost of such Environmental Response work, and such
19 insufficiency in funding (i) could not reasonably have been anticipated as of the deadline for
20 submitting a petition for review of an Annual Budget under the terms of Paragraph 26, or (ii)
21 was anticipated by ASARCO and was communicated to the Trustee prior to the Trustee's
22 acceptance of an Annual Budget. Nothing in this Paragraph shall affect the right of the United
23 States to direct ASARCO to perform or complete Environmental Response work subject to
24 the limits specified in Paragraph 33.

25 IX. ENVIRONMENTAL TRUST PAYMENTS

26 28. A Performing Entity may submit reimbursement requests ("Claims") to the
27 Trustee, with a copy to the United States and ASARCO, for any Environmental Response work
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1 for which the claimant was designated as Performing Entity in any Annual Budget. Such
2 Claims must include a full description of all work performed, itemized contractor invoices,
3 and other supporting documentation required under the Trust Agreement. Except as provided
4 in Paragraphs 29 and 30, the Trustee shall be authorized to reimburse a Performing Party only
5 to the extent a Performing Party submits receipts or other proof showing that it has already
6 paid its contractors directly for work that was authorized under the Annual Budget, or, in the
7 case of ASARCO's internal sampling and analytical laboratory costs incurred in lieu of
8 retaining an outside contractor for performance of the same sampling and laboratory work,
9 where such costs were the low bid out of at least three bids and were included on an Annual
10 Budget, only to the extent that ASARCO submits documentation establishing that such costs
11 have already been incurred. The United States and ASARCO shall have thirty (30) days from
12 the date of service of a copy of any Claim in which to serve an objection to that Claim,
13 indicating the basis for contending the Claim is not authorized under the Annual Budget or is
14 not properly documented or supported. Such objection shall be served on the Trustee, the
15 Performing Entity making the Claim, and the United States or ASARCO as appropriate. If
16 there is no objection within thirty days from the date of service of a copy of the Claim, the
17 Trustee shall promptly pay the Claim to the Performing Entity subject to any limitation on
18 payments provided in the Trust Agreement, unless the Trustee concludes that such payment is
19 not authorized under the Annual Budget or that the Claim was not properly documented or
20 supported. In the event that there is an objection or the Trustee determines that the Claim as
21 submitted should not be paid, the Performing Entity making the Claim shall promptly submit
22 a written presentation to the Trustee in support of payment of the Claim or shall withdraw the
23 Claim. The Trustee shall promptly make an independent determination as to whether to allow
24 the Claim, and shall notify the United States, ASARCO, and the Performing Entity of his or her
25 decision. The decision of the Trustee to pay a Claim is not subject to judicial review except
26 upon an allegation by ASARCO or the United States that the Trustee exceeded his or her legal
27 authority in making that decision. The decision of the Trustee to deny a Claim is subject to
28 judicial review only upon petition of the Performing Entity that submitted the Claim alleging

1 that the Trustee was in error in concluding that payment of the Claim was not authorized under
2 the Annual Budget or that the Claim was not properly documented or supported.

3 29. The Trustee shall be authorized to directly reimburse a contractor of a
4 Performing Entity, except a contractor of the United States, for a Claim or a portion thereof
5 upon submission of unpaid contractor invoices with the Claim and a statement by the
6 Performing Party that the contractor has not yet been paid and is to be paid directly by the
7 Trustee.

8 30. If an Annual Budget accepted by the Trustee designates EPA as the Performing
9 Entity for Environmental Response work at a Site, the Trustee shall transfer the amount
10 budgeted for that work from the Environmental Trust to a special account established by EPA
11 for that Site within the Hazardous Substances Superfund without the need for the filing of a
12 Claim. The Trustee shall make the transfer, in accordance with instructions provided by EPA,
13 by the later of (a) ten days after the Trustee's acceptance of the Annual Budget designating EPA
14 as the Performing Party, or (b) ten days after receipt of the payment under Note B being
15 allocated in that Annual Budget. EPA may utilize the transferred funds only to pay for
16 performance or oversight of the work specified for the relevant Site in the Annual Budget.
17 Within 60 days after completion of that work, EPA shall submit a report to the Trustee
18 documenting the work performed and the costs incurred for the work. EPA shall provide the
19 same degree of documentation as required in Paragraph 28, and the process of reviewing,
20 challenging and approving such submissions shall be the same as set forth in Paragraph 28. If
21 the United States has expended less than the full amount transferred to it under this Paragraph
22 for performance or oversight of the Environmental Response work specified in the Annual
23 Budget, it shall return the excess proceeds to the Trust. If the Trustee, after review of EPA's
24 report, determines that EPA expended less than the full amount transferred on performance
25 or oversight of the work specified in the Annual Budget and has not returned the excess
26 proceeds to the Trust, the Trustee shall so notify EPA and shall request repayment of the
27 amount not expended on that work. EPA shall have thirty days either to challenge the Trustee's
28 determination by petition to this Court or to pay the amount requested to the Trustee for

1 redeposit into the Environmental Trust Account. If the Trustee's determination is upheld in
2 whole or in part, EPA shall, within thirty days, pay the amount determined to be payable to the
3 Trustee for redeposit into the Environmental Trust.

4 31. Any Claim or portion thereof not paid solely because there was insufficient
5 money in the Environmental Trust or because it exceeded the amount budgeted in the Annual
6 Budget for any calendar year may be considered for inclusion in the Annual Budget for the
7 following calendar year.

8 32. Any portion of the Environmental Trust not expended in a given year shall be
9 available to pay Environmental Response Costs in the following calendar year.

10 11 **X. COVENANTS OF THE UNITED STATES**

12 **Temporary Deferral of Existing Environmental Obligations**

13 33. The United States agrees that the total annual Environmental Response Costs that
14 the United States shall require ASARCO to incur or pay during calendar years 2003 through
15 2005 pursuant to any consent decree or administrative order, including but not limited to those
16 listed in Paragraphs C, D, or E, over and above the Environmental Response Costs designated
17 for funding by the Environmental Trust during those calendar years pursuant to Section VIII of
18 this Consent Decree, shall not exceed the following limits:

19 Calendar Year 2003 - \$2 million;

20 Calendar Year 2004 - \$2.5 million; and

21 Calendar Year 2005 - \$3 million.

22 Subject to the reservation of rights set forth in Section XII, the United States agrees

23 a. not to seek judicial enforcement against ASARCO of any consent decree
24 or administrative order, and

25 b. not to seek judicial enforcement to recover costs of Environmental
26 Response work incurred by the United States prior to February 1, 2003,
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1 such noncompliance has occurred between December 1997 and the date of entry of this
2 Consent Decree.

3 36. The United States covenants and agrees not to seek from ASARCO stipulated or
4 statutory penalties based on any failure of ASARCO to comply fully with any requirement
5 under an existing CERCLA or RCRA consent decree or administrative order that requires
6 ASARCO to provide financial assurance for Environmental Response work to be performed
7 under that decree or order, where such noncompliance occurs during calendar years 2003,
8 2004 and 2005, provided that ASARCO remains in compliance with all obligations imposed
9 under the terms and conditions of this Consent Decree and all agreements or schedules arising
10 thereunder, and provided that the payments to be made under Note B as assured by the Guaranty
11 are not in default. However, nothing in this Paragraph limits the rights of the United States to
12 seek information about ASARCO's financial status.

13 37. Effective upon the occurrence of all events required to occur on or before the
14 Closing Date, as set forth in Paragraph 6, and not before such time, the United States covenants
15 not to sue and agrees not to pursue all of its Environmental Response Costs incurred prior to
16 February 1, 2003, for: (a) the Circle Smelting Non-Time Critical Removal Site; (b) the Globe
17 Plant Site; and (c) the Murray Smelter Consent Decree - Relevant Section. In addition, the
18 United States covenants not to sue and agrees not to pursue \$2 million of its response costs
19 incurred prior to February 1, 2003, for the Commencement Bay Nearshore/Tideflats Superfund
20 Site - Relevant Operable Units.

21 38. Effective upon the occurrence of all events required to occur on or before the
22 Closing Date, as set forth in Paragraph 6, and not before such time, the United States covenants
23 not to sue and agrees not to pursue any legal challenge to the transfer of the Defendants'
24 ownership interest in SPCC stock based on a claim that the transfer was not for sufficient value
25 received or based on any other claim alleged in the Complaint. Furthermore, as provided in
26 Paragraph 7, the Stipulation shall be deemed terminated upon the occurrence of all events
27
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1 to the extent that such enforcement would require ASARCO to incur or pay Environmental
2 Response Costs during calendar years 2003 through 2005 in excess of the limits prescribed
3 in this Paragraph, provided that ASARCO remains in compliance with all obligations imposed
4 under the terms and conditions of this Consent Decree and all agreements or schedules arising
5 thereunder, and provided that the payments to be made under Note B as assured by the Guaranty
6 are not in default. Costs incurred by ASARCO in connection with Environmental Response
7 other than such Environmental Response as the United States directs ASARCO to perform
8 shall not be included for purposes of calculating credit towards the annual limits prescribed
9 in this Paragraph. In calculating Environmental Response Costs for purposes of the limits
10 established in this Paragraph only, ASARCO may include internal costs that are incurred in lieu
11 of costs that otherwise would have been expended for an outside contractor for performance
12 of the same Environmental Response work. Such costs may be included only if ASARCO and
13 the United States agree in advance on the scope of the work by ASARCO employees to be
14 included in such credit and the specific amount to be credited.

15 Other Covenants and Agreements

16 34. Any payments actually made to the United States from the Environmental Trust
17 for a particular Site shall be credited by the United States to the appropriate account for that
18 Site. Environmental Response work performed at a Site that is funded by monies credited to
19 the appropriate account for that Site under this Paragraph shall reduce the liability of ASARCO
20 and any other potentially responsible parties at that Site in accordance with applicable law. The
21 United States covenants and agrees not to seek reimbursement from ASARCO of any amounts
22 credited to a Site account pursuant to this Paragraph.

23 35. The United States covenants and agrees not to seek from ASARCO stipulated or
24 statutory penalties based on any failure of ASARCO to comply fully with any requirement to
25 perform Environmental Response work or any requirement under an existing CERCLA or
26 RCRA consent decree or administrative order that requires ASARCO to provide financial
27 assurance for Environmental Response work to be performed under that decree or order, where
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1 required to occur on or before the Closing Date as set out in Paragraph 6, subject to the
2 reopener provisions of Paragraph 46.

3
4 **XI. COVENANTS OF ASARCO, SPHC, AMC AND GRUPO MEXICO**

5 39. ASARCO, SPHC, AMC, and Grupo Mexico agree not to assert any claims or
6 causes of action against the United States, or its contractors or employees, in connection with
7 the matters addressed by or work performed under this Consent Decree, including but not
8 limited to:

9 a. any direct or indirect claim for reimbursement from the EPA Hazardous
10 Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2),
11 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or
12 9613, or any other provision of law, for Environmental Response Costs paid by the
13 Environmental Trust or for costs subject to the United States' covenant not to sue set
14 forth in Paragraph 37;

15 b. any claims arising out of the work performed under any Annual Budget
16 for which a Claim is paid by the Environmental Trust; and

17 c. any claims arising out of the United States' challenge to
18 ASARCO/SPHC's transfer of its ownership interest in SPCC stock once such transfer
19 is completed.

20 40. ASARCO, SPHC, AMC, and Grupo Mexico agree not to assert any claim or
21 defense against the United States in any subsequent administrative or judicial proceeding
22 initiated by EPA, DOI or USDA, or by the United States on behalf of EPA, DOI or USDA, for
23 injunctive relief, recovery of response costs, or other appropriate relief relating to matters
24 within the scope of this Consent Decree, based upon the principles of waiver, res judicata,
25 collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any
26 contention that the claims raised in the subsequent proceeding were or should have been
27 brought in this proceeding.

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XII. RESERVATION OF RIGHTS

41. The United States reserves, and this Consent Decree is without prejudice to, all rights against ASARCO/SPHC with respect to all matters not expressly included within the covenants and agreements of the United States set forth in Section X, including but not limited to the right to file and enforce liens authorized under applicable environmental statutes and the right to pursue enforcement action against ASARCO, with respect to:

a. liability of ASARCO under CERCLA, RCRA, the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and any other environmental statute or the regulations promulgated thereunder;

b. liability of ASARCO under any existing consent decrees or administrative orders, including but not limited to those listed in Paragraphs C, D, or E;

c. liability for response actions and costs incurred or to be incurred by the United States;

d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

e. liability for unlawful transfers of corporate assets or other prohibited transactions regardless of whether such transactions are related to obligations within the scope of this Consent Decree, except as provided by Paragraph 38, and

f. liability for failure of ASARCO to meet a requirement of this Consent Decree.

42. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against ASARCO with respect to criminal liability.

XIII. RELATIONSHIP TO EXISTING CONSENT DECREES AND ORDERS

43. Nothing in this Consent Decree shall be deemed to modify any existing consent decree or administrative order. If the Parties conclude that the schedule for work or payments set forth in an existing consent decree or administrative order should be modified because (a)

1 the work and/or payments were due during the period covered by the United States' agreement
2 in Paragraph 33 to forbear from enforcement of existing consent decrees and administrative
3 orders and were covered by that agreement, and (b) the work was not required in the pertinent
4 Annual Budget(s) under this Consent Decree, the Parties shall seek in good faith to modify the
5 schedule set forth in the relevant consent decree or administrative order to take into account
6 the period in which the United States agreed to forbear from enforcement. Where the consent
7 of other parties to the consent decree or administrative order is required to accomplish a
8 modification, the Parties shall jointly seek to obtain such consent. Nothing in this Paragraph
9 affects any requirement for court approval or public notice and comment that may apply to a
10 proposed modification to an existing consent decree or administrative order on consent.

11 12 **XIV. EFFECT OF NONCOMPLIANCE**

13 44. The transfer conditions set forth in Paragraph 6 are necessary and material
14 components of the agreement embodied in this Consent Decree and are a condition precedent
15 to all other covenants and agreements set forth in this Consent Decree. Should the transfer of
16 ASARCO/SPHC's ownership interest in SPCC stock fail to occur by June 1, 2003, such failure
17 shall constitute a material breach of this Consent Decree. In the event of such material breach,
18 (i) this Consent Decree shall become null and void in its entirety, including all agreements and
19 covenants set forth in this Consent Decree, (ii) the Stipulation shall remain in full effect, and
20 (iii) the United States may seek to avail itself of any other remedies available by law or equity.
21 The June 1, 2003 deadline may be extended by the mutual written agreement of all signatories
22 to this Consent Decree.

23 45. Should ASARCO/SPHC transfer its ownership in SPCC stock in a manner that
24 fails to conform fully and completely with all conditions identified in Paragraph 6, such failure
25 shall constitute a material breach of this Consent Decree. In the event of such material breach,
26 (i) the covenants of the United States as set forth in Section X of this Consent Decree shall
27 become null and void; (ii) the United States in its discretion may declare this Consent Decree
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1 null and void in its entirety by written notice to ASARCO/SPHC; (iii) the Stipulation shall
2 remain in full effect; and (iv) the United States may seek to avail itself of any other remedies
3 for such breach that are available by law or equity.

4 46. Should the transfer of ASARCO/SPHC's ownership in SPCC stock be
5 subsequently completely unwound, invalidated, or nullified pursuant to a judgment issued by
6 a court of competent jurisdiction, (i) this Consent Decree shall become null and void in its
7 entirety, including all agreements and covenants set forth in this Consent Decree, except that
8 the covenants of ASARCO, SPHC, AMC and Grupo Mexico set forth in Paragraphs 39.b, 39.c,
9 and 40 shall remain in valid and in full effect; (ii) the Stipulation shall be reopened and shall
10 be in full effect; and (iii) the United States may seek to avail itself of any other remedies
11 available by law or equity.

12 47. Should the assignment of Note B and/or the Guaranty to the Environmental Trust
13 be unwound, set aside or otherwise be rendered unavailable for use by the Environmental Trust
14 in the manner set forth in Sections VII and VIII, the United States may declare any or all
15 agreements and covenants set forth in Paragraphs 33 through 37 null and void.

16 48. Except as provided below, upon ASARCO's failure or inability to successfully
17 contract for or perform the Environmental Response work at any Site for which ASARCO is
18 designated a Performing Entity in any Annual Budget, the United States may upon written
19 notice to ASARCO and the Trustee (i) withdraw its covenant set forth in Paragraph 33 of this
20 Consent Decree with respect to such Site, (ii) terminate ASARCO's right to participate in the
21 performance of Environmental Response work under the terms of Section VII at such Site, (iii)
22 terminate ASARCO's right to seek payment of Claims under the terms of Section IX with
23 respect to such Site, and (iv) assume the performance of any Environmental Response work
24 assigned to ASARCO at such Site by any Annual Budget or amendment and the right to submit
25 Claims for such work. In the event that ASARCO's failure or inability to successfully contract
26 for or perform the Environmental Response work at any Site for which ASARCO is designated
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1 a Performing Entity in any Annual Budget is caused by a Force Majeure, this Paragraph shall
2 not apply to such nonperformance.

3 49. The actions of the United States under this Section are subject to the right of
4 ASARCO to seek review by this Court of any such action within fifteen days of service of any
5 notification prescribed by this Section. In any such proceeding, ASARCO shall have the burden
6 of establishing by clear and convincing evidence that such action is improper.

7
8 **XV. APPENDICES**

9 50. The following appendices are attached and incorporated into this Consent
10 Decree:

11 Appendix A is Note A (\$123 million promissory note issued by AMC to SPHC).

12 Appendix B is Note B (\$100 million promissory note issued by AMC to SPHC).

13 Appendix C is the Agreement of Sale.

14 Appendix D is the Guaranty Agreement.

15 Appendix E is the irrevocable assignment by SPHC of Notes A and B and the Guaranty
16 to ASARCO.

17 Appendix F is the Trust Agreement.

18 Appendix G is the Security Agreement between ASARCO and the United States.

19 Appendix H is the irrevocable assignment by ASARCO of Note B and the Guaranty to
20 the Environmental Trust.

21 Appendix I contains the documents supporting ASARCO's assertion that the transfer
22 of its ownership interest in SPCC as structured in Paragraph 6 provides ASARCO and SPHC
23 with reasonably equivalent value in return for the transfer of the SPCC shares.

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XVI. ADDITIONAL PROVISIONS

51. Except as expressly stated herein, nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a signatory to this Consent Decree.

52. This Consent Decree does not provide ASARCO with protection against contribution claims by third parties relating to Environmental Response at any Site.

53. Notwithstanding anything to the contrary in this Consent Decree, nothing in this Consent Decree releases or nullifies ASARCO's liability to any non-federal governmental entity under police and regulatory statutes or regulations, or alters or nullifies any non-federal governmental entity's police and regulatory authority and discretion to require ASARCO's compliance with applicable law.

54. Whenever, under the terms of this Consent Decree, written notice is required to be given, or a report or other document is required to be served or provided by one Party to another, it shall be directed to the individuals at the addresses specified below via U.S. mail or overnight mail, unless those individuals or their successors give notice of a change of address to the other parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided.

As to the United States:

To the Department of Justice:

For Overnight Mail:
Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice
1425 New York Ave. NW
Washington, DC 20005
Ref. DOJ File No. 90-11-3-128/5

For Regular Mail:
Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, DC 20044
Ref. DOJ File No. 90-11-3-128/5

1 To the Environmental Protection Agency:

2 For Overnight Mail:
3 Office of Site Remediation Enforcement
4 Regional Support Division
5 Environmental Protection Agency
6 Ariel Rios Building South, Room 4202
7 1200 Pennsylvania Avenue, N.W.
8 Washington , D.C. 20460

9 For Regular Mail
10 Office of Site Remediation Enforcement
11 Regional Support Division (MC 2272A)
12 Environmental Protection Agency
13 Ariel Rios Building South,
14 1200 Pennsylvania Avenue, N.W.
15 Washington , D.C. 20460

16 To the Department of the Interior:

17 Regional Solicitor
18 U.S. Department of the Interior
19 500 NE Multnomah, Suite 607
20 Portland, Oregon 97232

21 To the Department of Agriculture:

22 USDA Office of General Counsel
23 740 Simms St., Room 309
24 Golden, CO 80401

25 As to ASARCO:

26 DOUGLAS McALLISTER
27 ASARCO Incorporated
28 2575 E. Camelback Road
Suite 500
Phoenix, AZ 85016-4240
(602) 977-6507

29 An address for the Trustee shall be provided upon the establishment of the Trust and the
30 identification of the Trustee.

31 55. This Consent Decree may not be modified without the prior written consent of
32 the Parties hereto or their successors in interest and the approval of the Court, except that
33 Appendices F and G (including attachments) may be modified according to their terms and
34 conditions without court approval.

1 56. This Consent Decree may be delivered by courier, mail, or facsimile. It may
2 be executed in counterparts, each of which shall be deemed to be an original, and all of such
3 counterparts taken together shall be deemed to constitute one and the same agreement

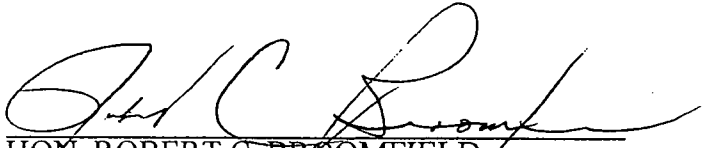
4 57. The undersigned representatives of a Party to this Consent Decree certify that
5 they are fully authorized to enter into this Consent Decree and to execute and legally bind
6 such Party to this Consent Decree.

7 58. This Consent Decree constitutes the final, complete, and exclusive agreement
8 and understanding among the parties with respect to the settlement embodied in the Consent
9 Decree. The parties acknowledge that there are no representations, agreements or
10 understandings relating to the settlement other than those expressly contained in this Consent
11 Decree.

12 59. Upon approval and entry of this Consent Decree by the Court, this Consent
13 Decree shall constitute a final judgment in this action between and among the United States
14 and the Defendants.

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16 SO ORDERED:

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18 FEBRUARY 2, 2003
19 Date


HON. ROBERT C. BROOMFIELD
Judge
United States District Court
District of Arizona

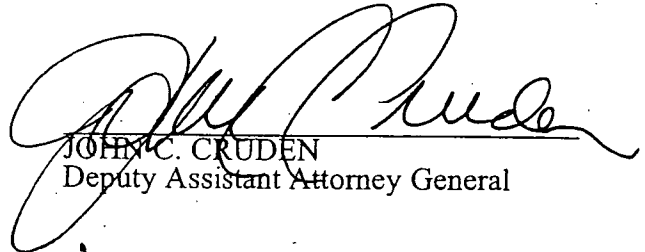
1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v.*
2 *ASARCO, et al.*

3 FOR THE UNITED STATES:

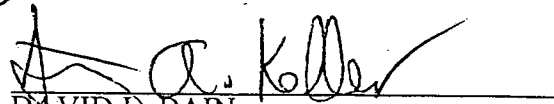
U.S. Department of Justice
Environment and Natural Resources
Division

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8 KELLY A. JOHNSON
Principal Deputy Assistant Attorney General

9
10 

11 JOHN C. CRUDEN
Deputy Assistant Attorney General

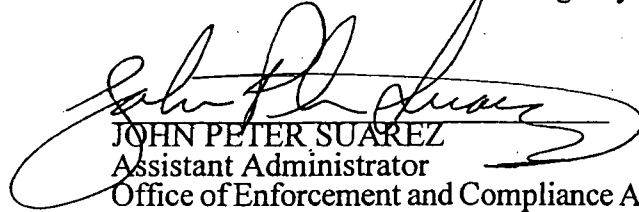
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14 DAVID L. DAIN
15 STEVEN A. KELLER
16 KIM J. SABO
17 Trial Attorneys
Environmental Enforcement Section
Environment and Natural Resources
Division
18 Ben Franklin Station
19 P.O. Box 7611
Washington, D.C. 20044
(202) 514-3644

20 SUE KLEIN
21 Assistant United States Attorney
22 40 N. Central Avenue, Suite 1200
23 Phoenix, Arizona 85004
24 (602) 514-7740
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1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v.*
2 *ASARCO, et al.*

3 U.S. Environmental Protection Agency

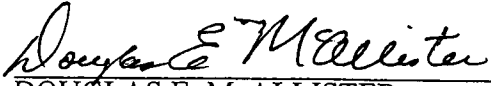
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5 JOHN PETER SUAREZ
6 Assistant Administrator
7 Office of Enforcement and Compliance Assurance

8 Of Counsel:

9 CARA STEINER-RILEY
10 U.S. Environmental Protection Agency
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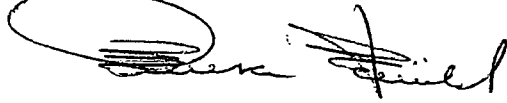
1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v.*
2 *ASARCO, et al.*

3 FOR ASARCO INCORPORATED:
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DOUGLAS E. McALLISTER
Vice President, General Counsel & Secretary
ASARCO Incorporated
2575 E. Camelback Road
Suite 500
Phoenix, AZ 85016-4240
(602) 977-6507

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v.*
2 *ASARCO, et al.*

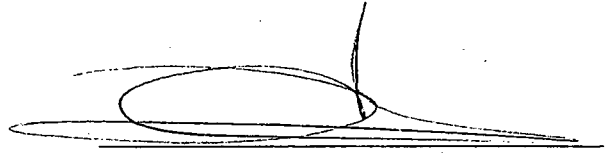
3 FOR SOUTHERN PERU HOLDINGS CORPORATION:

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6 ERNESTO DURAN TRINIDAD
7 CORPORATE CONTROLLER
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2 *ASARCO, et al.*

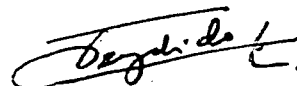
3 FOR AMERICAS MINING CORPORATION:
4 Solely with respect to its obligations as defined in Paragraph 3

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7 HECTOR GARCIA DE QUEVEDO
8 MANAGING DIRECTOR
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1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States v.*
2 *ASARCO, et al.*

3 FOR GRUPO MEXICO S.A. de C.V.:
4 Solely with respect to its obligations as defined in Paragraph 3

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8 DANIEL TELUECHEA
9 MANAGING DIRECTOR
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